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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 795

THE UNITED STATES OF AMERICA, PETITIONER

vs.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1932
CERTIORARI GRANTED MARCH 28, 1932

(36,609)

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1 In United States District Court, Southern District of New York

UNITED STATES OF AMERICA

v.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," BEAM 21.5 feet, length 82 feet, depth 8.1 feet. Official No. 222218

Statement under rule 13, subdivision 4

CAUSE OF ACTION

Sections 4677, 4320, and 4321, U. S. R. S.
April 2, 1928, filed libel and issued monition ret. 4/24/28.
April 3, 1928, filed claim.
April 6, 1928, filed notice of motion for release of vessel upon filing bond. Motion denied without prejudice, Winslow, J.
April 10, 1928, filed order denying motion for release of vessel with leave to renew upon filing of claimant's answer, Winslow, J.
April 14, 1928, filed answer.
2 April 20, 1928, filed notice of motion for release of vessel upon filing bond. Motion granted on certain conditions, Winslow, J.
April 23, 1928, filed note of issue and notice of trial—May.
April 24, 1928, filed monition—boat attached—notice given.
June 12, 1928, filed order for release of vessel upon filing bond—$10,000, Winslow, J.
June 18, 1928, issued release.
January 12, 1931, filed opinion 6247—A 97-88—libel dismissed, Woolsey, J.
January 27, 1931, filed final decree dismissing libel, Woolsey, J.
February 24, 1931, filed petition, notice and order allowing appeal, Bondy, J.
February 24, 1931, filed assignments of error.
February 28, 1931, filed citation of C. C. A. returnable 3/21/31.

3 In United States District Court

(Title omitted.)

Libel

The libel of information of the United States of America, by its proctor, Charles H. Tuttle, United States attorney for the Southern District of New York, in a cause of forfeiture, civil and maritime, for breach of the provisions of sections 4377, 4320, and 4321 of the Revised Statutes of the United States, and the acts amendatory thereof and supplemental thereto, upon information and belief alleges:

First. That at all the times hereinafter mentioned, libellant was and still is a sovereign power.

Second. That the above-named two-masted auxiliary schooner "Ruth Mildred" is 82 feet in length, 21.5 feet beam, and 8.1 feet depth, and was duly licensed for the fisheries at Gloucester, Mass., on July 13, 1927, Official No. 222218.

4 Third. That on or about the 2nd day of March, 1928, at a wharf at the foot of Fulton Street, East River, New York City, in the Southern District of New York and within the jurisdiction of this court, the collector of customs at the port of New York seized said two-masted auxiliary schooner "Ruth Mildred" for violation of the laws of the United States, and ever since said seizure, said vessel has remained and still is in the possession and custody of said collector of customs as forfeited to the United States for the cause propounded as follows:

Fourth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Fifth. That on or about the 2nd day of March, 1928, at the Southern District of New York and within the jurisdiction of this court, the said two-masted auxiliary schooner "Ruth Mildred," being a vessel duly licensed pursuant to sections 4320 and 4321 of the Revised Statutes and the acts amendatory thereof and supplemental thereto, for the fisheries, did engage in and was employed in a trade other than that for which she was then and there licensed, that is, said schooner did engage in the illegal transportation and carriage of intoxicating liquor containing more than one-half of one per cent of alcohol by volume.

Sixth. That by reason of the premises and of the provisions
5 of section 4377 of the Revised Statutes of the United States, said vessel became and is forfeited.

Wherefore, libellant prays that due process issue in that behalf as well of attachment to bring said vessel within the jurisdiction of this court, as of monition to all parties in interest to appear on the return day of such process and duly intervene therein by claim and plea in the premises and due proceedings being had thereon, that for the causes aforesaid said vessel be condemned as forfeited and the proceeds thereof be distributed according to law, or that such other disposition be had thereof as the court shall direct.

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Proctor for Libellant.

Office and post office address, U. S. Courts and Post Office Bldg., Borough of Manhattan, City of New York.

Dated, New York, March 31, 1928.

6 In United States District Court

(Title omitted.)

Notice of claim.

And now Nils Soderberg, intervening herein as owner of the above-described vessel "Ruth Mildred," appears before this honorable court and makes claim to the said vessel, as the same is attached by the marshal under the process of this court, at the instance of the United States of America, and the said Nils Soderberg avers that, at the time of the attachment thereof, he was and now is the true and bona fide owner of the said vessel "Ruth Mildred," and that no other person is the lawful owner thereof.

Wherefore, the said claimant prays that he may be permitted to appear and defend accordingly.

NILS SODERBERG.

7 (*Duly sworn to by Nils Soderberg; jurat omitted in printing.*)

8 In United States District Court

(Title omitted.)

Answer

And now comes Nils Soderberg, appearing herein as owner of the above-named vessel, and, in answer to the libel of information filed by the United States of America, by his attorney, Louis Halle:

First. Denies each and every allegation set forth in paragraph marked "Fifth," in the said libel contained, except that the said two-masted auxiliary schooner "Ruth Mildred" was a vessel duly licensed for the fisheries, and denies each and every allegation set forth in paragraph marked "Sixth" in the said libel contained.

For a first, separate, further, distinct, and affirmative defense, claimant herein alleges.

Second. That the libel proceedings herein are brought to forfeit the vessel above-named, by reason of a violation of section 4377 of the United States Revised Statutes. That said libel further

9 alleges that said violation occurred by reason of the said vessel being engaged in the illegal transportation and carriage of intoxicating liquor, containing more than one half of one per cent of alcohol by volume. Claimant contends that the violation set forth in said libel makes it mandatory upon the Government, if seeking to forfeit the said vessel, to do so pursuant to section 26 of the national prohibition act.

Wherefore, claimant prays that the libel herein be dismissed, and for such other and further relief as to this court may seem just and proper.

LOUIS HALLE,
Attorney for Claimant.

Office and post office address, 152 West 42nd Street, Manhattan, N. Y. C.

(Verified by Nils Soderberg 14th day of April, 1928.)

10 In United States District Court, Southern District of New York

UNITED STATES OF AMERICA, LIBELLANT

v.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," CLAIMANT

Statement of evidence

Before Hon. JOHN M. WOOLSEY, U. S. D. J. New York, December 15, 1930.

Appearances: Hon. Robert E. Manley, acting U. S. attorney, by A. H. Schwartz, Esq., of counsel; Louis Halle, Esq., proctor for claimant.

WILLIAM FRALEY BERG, called as a witness on behalf of the libellant, having been duly sworn, testified as follows:

Direct examination by Mr. SCHWARTZ:

Q. Mr. Berg, are you a member of the Coast Guard?—A. Yes, sir.

Q. What is your official position?—A. At that time I was acting as chief machinist.

11 Q. That is, during March, 1929, you held the position?—A. Of chief machinist on No. 148. I had charge of the engine room of the C. G. "148."

Q. Who was in charge of the boat?—A. Watson.

Q. Do you know his full name?—A. George Watson was his first name.

Q. Are you acquainted with the boat "Ruth Mildred"?—A. I have seen her oftentimes before and she was on the suspicious list. We had orders to keep an eye out for it.

Q. Did you see the "Ruth Mildred" in March, 1929?—A. Yes, sir.

Q. What day?—A. The second day.

Q. About what time did you see her?—A. Around 7 o'clock in the evening. Around that time sometime.

Q. Now, where were you when you first saw the "Mildred"?—A. Between Race Rock and Little Gull.

Q. I show you this piece of paper—which will be marked as "Government's Exhibit for Identification No. 1."

THE COURT. Is there any objection to offering it in evidence?

MR. HALLE. No objection to it going into evidence right now.

(Marked "Government's Exhibit 1" in evidence.)

Q. Now, Mr. Berg, will you mark on Government's Exhibit No. 1 the point at which you first saw the "Ruth Mildred"?

Mr. HALLE. It is already marked and I will concede that is the mark.

12 A. Little Gull and Race Point in here. Right in here is where we first saw her.

Q. Put the letter A.—A. (Witness complies.)

Q. The little A indicates the point where you first saw her, is that it?—A. Yes.

Q. What day was that, Mr. Berg?

Mr. HALLE. That is in the Long Island Sound, is it not?

The WITNESS. Yes.

The COURT. A little to the northward of Gardiner's Island.

Q. Will you refresh your recollection from your log?—A. That was on the 1st we sighted her.

Q. That was on the 1st?—A. Yes; when we seized it was on the 2d.

Q. Will you tell the court what happened on March 2, 1929, at the time you sighted her?—A. We seen this boat going along and she was just putting on her lights and this fellow, the first-class boatswain, and myself, was on watch. We saw the "Ruth Mildred." We didn't know what it was. It was a little distance off from us, so we go over alongside of her, so we whipped the light on her and we see it is the "Ruth Mildred" going down. It is pretty rough——

The COURT. A boat of which you had been suspicious for some time?

The WITNESS. Yes, sir—we had orders to look out for her.

A. (Continuing.) He told me to go down and call the captain, so I go down and tell the captain that the "Ruth Mildred" is

13 sighted. He goes over alongside and sings out what he is and where is is bound for. He says he is bound for New York, so we called Block Island—that was our radio station where we got our orders from at that time. We told them the "Ruth Mildred" was bound for New York. They sent us back orders to follow the "Ruth Mildred," to stay with her until her cargo was discharged. So the next morning, why——

Q. What did you do then, Mr. Berg? Did you follow the "Ruth Mildred" into New York?—A. Well, we tagged it right down the Sound.

Q. When did you get into New York?—A. Around eleven o'clock.

Q. At night?—A. Next morning.

Q. That is March 22, 1929?—A. Yes, sir.

Q. Did you come in at the same time as the "Ruth Mildred"?—A. Was right behind her.

Q. Tell us what happened after that.—A. Well, we came down to the fish dock.

Q. Where is the fish dock?—A. Fulton Street Market. There was a boat on one side, so she goes over to the left to tie up, and about the time she gets—the whole crew is up on the deck—and just the

minute they tie up, make their lines fast, the whole crew leaves, the skipper and all. So about five or ten minutes afterwards, why, the skipper returned.

Q. Where were you at the time?—A. Laying alongside of her with lines, alongside the "Ruth Mildred."

Q. Did you board the "Ruth Mildred" at that time?—A. No, we just tied up alongside of her.

The COURT. Did not the crew come back?

14 The WITNESS. No, never did come back; left their clothes and all. Never changed clothes.

Q. Do you remember the name of the skipper?—A. I remember his name, Soderberg.

The COURT. Is that Nils Soderberg?

The WITNESS. That was his same, Nils Soderberg. So we stayed around and talked to him a little while.

Q. What was the conversation, please?—A. We asked him if he had a good catch, how he made out that trip. He said "pretty good." So about that time, down comes one of the customs officials. He comes on our boat and tells us he will take care of her.

Q. Was Soderberg there?—A. Yes, sir. He tells us he will take charge of the boat, but our captain told him he had orders to stand by until she discharged her cargo. So, he says, "If that is the case, if you are going to stand by her, I have other business to attend to," and he left.

Q. Who said that?

The COURT. The customs officer?

The WITNESS. The customs officer. He said if we were going to stand by, he would not stick around. So he had a cup of coffee, that is all, and he left. So we asked Soderberg when he was going to unload his fish. He said it was too late then, he did not figure on unloading until Monday, so the skipper said he would go around over and see what he could find.

15 The COURT. Was this Soderberg?

Mr. SCHWARTZ. This was Soderberg.

The COURT. And he was not going to unload his fish until Monday?

The WITNESS. Yes.

Mr. HALLE. There was ice in the boat at that time.

The WITNESS. So he said he would leave the fish there until Monday before he unloaded it, so the skipper told him——

Q. What skipper?—A. Mr. Watson.

Q. Your skipper?—A. Yes.

The COURT. You were there?

The WITNESS. Yes, sir. I stood right by him. We were down looking at the engines, a new Diesel job which had cost over $10,000 to get the engines installed in there. We were looking over them, so he said, "If that is the case," he said, "I might as well tell you the truth. You have a good catch here. I am loaded down to the gills with liquor." So, when he said that, he said, "What would it be worth to you to pull away and leave?" And captain, our cap-

tain, said he did not want to talk about anything like that, so he placed him under arrest and put a fellow by the name of Wolf and myself on guard of the boat, and not to let anybody on board or to get off until he came back, or until we turned it over to the customs officers.

Q. Did you examine the boat and find any liquor?—A. We did not.

16 Q. When did you find the liquor?—A. Found liquor when the customs officials came down. They placed him under arrest and took that schooner and towed her over alongside——

Q. The customs men came on board after you made the arrest?—A. Yes, sir.

The COURT. Did they look and see if there was liquor in it, or take the captain at his word?

The WITNESS. Took the captain at his word until the next morning. So that afternoon they pulled him over alongside the boat and opened her up, and there it was—the liquor was there.

The COURT. A captain's statement is binding on a vessel.

Q. How soon after Mr. Soderberg's admission did they make a search of the boat, if you know?—A. I don't think they opened her up until next morning.

The COURT. March 3rd?

The WITNESS. Yes, sir.

The COURT. Were the fish there all that time?

The WITNESS. Yes, sir, the fish was there. There was quite a few fish on top.

Q. Did you find liquor on board?—A. Yes, sir.

Mr. SCHWARTZ. I am not putting in any evidence at this time as to the amount. I think we will agree to that when we get to it.

17 Mr. HALLE. When we got to that I do not think there will be much difficulty.

Cross-examination by Mr. HALLE:

Q. When you saw the "Ruth Mildred" in Long Island Sound did any of the members of the C. G. boat speak to the "Ruth Mildred"?—A. Yes, sir.

Q. You asked the "Ruth Mildred" where she was going?—A. Yes, sir.

Q. And you told the "Ruth Mildred" you were following her up?—A. No, sir.

Q. Or that you would follow her up?—A. No, sir.

Q. Did you always keep in view of the "Ruth Mildred"?—A. Yes, sir.

Q. And the "Ruth Mildred" came to a stop at Fulton Market and tied up: you immediately tied your boat up to the "Ruth Mildred," did you not?—A. Yes, sir.

Q. And you went aboard the "Ruth Mildred"?—A. Yes, sir.

Q. Who went aboard?—A. The captain and I.

Q. And your boat was still tied up to the "Ruth Mildred" when Soderberg, the captain of the "Ruth Mildred," came back?—A. Yes, sir.

Q. You say that this boat was on the suspicious list?—A. Yes, sir.

Q. As a rum runner?—A. Yes, sir.

Q. You were looking for violations of the Volstead Act, is that not so?—A. Yes, sir.

Q. Up to the time that you actually tied your boat up to the "Ruth Mildred" and actually went on board the "Ruth Mildred" you
18 were suspicious of a cargo of liquor being on their boat?—A. We were suspicious of the cargo of liquor as the crew never came back.

Q. You were suspicious of the cargo of liquor when you tied the boat up?—A. Yes, sir.

Q. To this——A. Yes, we were suspicious in Long Island Sound.

Q. But you had no knowledge that she had any liquor at all?—A. No.

Q. And you had no knowledge of any liquor aboard even after you went on to the "Ruth Mildred"?—A. Yes, sir.

Q. It was only after the captain came back and you told him you were staying there until the boat was unloaded or the fish was unloaded, whatever it was to be unloaded, that Captain Soderberg made a statement to what effect?—A. That he had liquor aboard the boat.

Q. Now, what did he say? Did he say he had liquor, or the boat was loaded to the gills?—A. Loaded to the gills with contraband whiskey.

Q. He used the words "loaded with contraband whiskey"?—A. "Loaded to the gills with contraband whiskey." That is the words he used.

Q. That is the first time you had any knowledge there was any liquor on board?—A. Yes, sir.

Q. The captain's statement?—A. Yes, sir.

Q. How long had you been on board the boat when you first learned of this statement or first heard of this statement made?—A. Well, from the time we tied up to her it was, I guess, 20 to 25 minutes.

Q. You took possession of the "Ruth Mildred" when you tied up to her, did you not?—A. No, sir.

Q. You would not call that taking possession of the boat?—A. No. sir.

19 Q. You went immediately on board?—A. To examine her; yes, sir.

Q. And when you went on board to examine the boat you went looking to see if there was any liquor aboard?—A. Any violations of any kind.

Q. Did you see any violation of any kind before you spoke to Soderberg?—A. No, sir.

Q. You did not leave the boat, did you?—A. No, sir.

Q. And is it not really the fact that you made up your mind to stay there to find out if there was any liquor on board?—A. Yes, sir.

Q. That was the sole reason for being there?—A. That was my sole reason for being there.

The COURT. He admitted getting the liquor, he said, off Georges Banks. Where is Georges Banks?

The WITNESS. That is the Fishing Banks, but to tell you the truth, I can not give you the exact position of that.

Q. Well, is it off Newfoundland?—A. It is off Nantucket.

Q. It is off the United States?—A. I think it is off Nantucket Lightship.

The COURT. On the ocean side of Nantucket Lightship?

The WITNESS. Yes, sir.

Q. Now, did you go through the boat before Soderberg came back?—A. No, sir.

Q. Well, you went down in the engine room?—A. When he came back, yes, sir.

Q. Did you not do that before?—A. No, sir.

20 Q. You had iron rods with you, didn't you?—A. No, sir.

Q. Do you know what I am talking about?—A. Yes, sir.

Q. Poles. You carry poles, do you not?—A. No, sir.

Q. Did you get any poles that morning?—A. No, sir.

Q. Think back?—A. I am thinking.

Q. And you did not go fishing with the poles through the fish a bit?—A. No, sir.

Q. To find if there was any hard substance at the bottom of it?—A. We did not.

Q. And you saw the engine room. You did not go down into the engine room until Soderberg came back?—A. Captain Soderberg and another captain came back together.

Q. Where were you standing on this "Ruth Mildred" while the captain was away?—A. On the deck.

Q. And how long were you standing on this deck before Soderberg came back?—A. Between 15 and 20 minutes, I should judge; practically 20 minutes.

Q. You had no search warrant or order from the court authorizing you to make any search at that time?—A. No, sir.

Q. You had made up your mind that this—your captain and you or whoever was in the Coast Guard boat—that you would stay tied up there to the "Ruth Mildred" and be on the "Ruth Mildred" until the "Ruth Mildred" was unloaded?—A. Yes, sir, that was right.

Q. Did you tell Captain Soderberg that you would search the boat?—A. Did we tell him we would search the boat?

21 Q. Yes?—A. No, sir.

Q. You never told him you would search the boat?—A. No, sir. We told him we would examine his papers. That is what we told him.

Q. Did you examine his papers?—A. Yes, sir.

Q. Did you find anything wrong with his papers?—A. No, sir.

Q. So whatever you did on the "Ruth Mildred," such as examining papers, going aboard her, looking around, until Soderberg told you that she was loaded to the gills, you did not have any knowledge of any violation of law, is that not so?—A. I don't just get you.

Q. (Reporter repeated last question.) A. Yes, sir.

Redirect examination by Mr. SCHWARTZ:

Q. Just a couple of questions, Mr. Berg. As a member of the Coast Guard, what violations were you looking for?—A. For what violations?

Q. Yes?—A. Well, it could be plenty of different violations. His papers could be wrong. License, his license for fishing may be wrong. His lights, or anything.

Q. In other words, when boarding the boat, were you interested in the liquor violation——A. No, sir.

Mr. SCHWARTZ. I think that is all, except for the amount of liquor found.

Colloquy between court and counsel

Mr. HALLE. I will stipulate that the witness, if called, would testify as to the amount of the liquor.

22 The COURT. The domestic value is estimated at $62,400; foreign value estimated to be $27,800; and that the "Ruth Mildred" was appraised subsequently at $10,000.

Mr. SCHWARTZ. There are a couple of other stipulations I want to put in: There was found on board the "Ruth Mildred" 220 bags and 170 bags containing alcohol, liquor, and rye whiskey. Samples of this liquor were taken by the members of the customs and the Coast Guard. They were labaled and sealed and properly transmitted to the United States laboratory, appraisers' stores, to be analysed by the United States chemist. The analyses of the liquids found aboard the "Ruth Mildred" is that the liquids contain more than one-half of one per cent of alcohol by volume, and were fit for beverage purposes. On March 2, 1928, Nils Soderberg was examined in the presence of J. J. Henry, customs——

Mr. HALLE. That is not part of your record.

Mr. SCHWARTZ. It is part of the record. I am going to put in the admissions of this captain.

Mr. HALLE. That is after——

The COURT. It does not make any difference. It is the captain of the vessel.

Mr. HALLE. It is after his arrest.

The COURT. The captain of the vessel makes an admission and it does not have to be part of the res gestae or anything else.

Mr. HALLE. I am talking about the search and seizure. If the original search and seizure were illegal, the entire examination of the captain——

The COURT. You can object to it, and I will let it in. I do not think it is illegal.

What was the suspicion you had against this vessel in the first place?

23 The WITNESS. She had been engaged in hauling liquor. They give us a list of the boats that are known to make contact off shore, and it was one of them.

Mr. HALLE. The Coast Guard makes a list up of the vessels which they suspect are rum-runners; and the courts have held time and again that having suspicion that some violation of law was occurring is not sufficient; it must be based on something more than suspicion.

The COURT. It might not be enough to seize her out in Long Island Sound, but they refrained from doing that until she came in, and when the captain was hard up against him they could have just lay quiescent there and watched it, and these things would subsequently emerge from under the fish, and being faced by the alternative of that delay with a certainty of discovery at the end of it, the captain, like a rather sensible fellow, I think, admitted it out of hand. Now, how can you make that out?

Mr. HALLE. That is just it. They were already on his boat. They were tied up to him. They were lying around. In the first place, they had no right to go board his boat. It is just like a man driving a truck through the street and having an officer jump aboard his truck and he is on there. Well, he is there illegally. He has no right to get on the truck. It is the same thing with the Coast Guard. They have no right to go aboard a boat because they are suspicious of her carrying liquor. They are bound by the same rules and same limitations as a prohibition agent. This was barely and simply a suspicion that she carried it. Now, I asked the witness when

24 he jumped aboard the boat if he saw anything wrong. He said no.

Now, he surely had no right to stay there. It is an unreasonable search. By what power or authority did they tie themselves up to the "Ruth Mildred" without any knowledge of any violation of law?

I think there are a number of cases on the subject which would make this an unreasonable search. The police officer jumps on a man's truck and he says, "I am going to stay here until you unload this truck." He says, "No use wasting your time, Boss. I have got liquor on board." Now, there is no possible right there, nor is there any right here. The Coast Guard have no greater rights than prohibition agents in liquor cases.

The WITNESS. The Coast Guard has the right to search a boat on shore or off shore to see if she is violating the law.

Mr. SCHWARTZ. Judge Brandeis, in the "Maul" case, pointed out that the men of the Coast Guard——

Mr. HALLE. The "Maul" case is entirely different. It went up to the Supreme Court on one question: Did the Coast Guard have the right to police a domestic boat when outside the limits, and they said yes. That is all the "Maul" case holds.

Here is a witness who says that the only suspicion they had against the boat was she was carrying liquor. The only law that is involved here is the prohibition law. There is nothing else. And the Conway case is squarely in point and in the Gambino case the Supreme Court went so far as to hold that a State officer who looks for a Federal prohibition violation becomes a Federal officer
25 for that purpose, and the same way here. The Coast Guardsman becomes a Federal prohibition agent when he looks for liquor.

Mr. SCHWARTZ. Will you concede that the customs men could have waited around?

Mr. HALLE. I beg your pardon, the customs men could not have stayed there either, because Judge Byers ruled in the case that Mr. Crotter tried, a criminal case; on the same evidence as here, ruled the search and seizure illegal. Judge Byers asked, "After you got aboard the boat and saw her running without lights did you discover any other violation of law," and they said "No."

The COURT. I suppose it is on the theory of a person running away. You say all the crew go ashore like so many rats and disappear and not come back. Does not that of itself create a reasonable ground for investigating why they are getting off in such extraordinary fashion? It would to my mind.

Mr. HALLE. You would think after a man was on a boat for a few days he would be glad to go ashore. They do it every day.

The WITNESS. You would think they would take time to take their clothes off with them.

Mr. HALLE. That is only one suspicion. Upon any other suspicion they still have not got a fact left. As Judge Byers said in that case—I happened to be present in the court room—he said to the United States attorney, "Well, after he went aboard the boat he said he found the boat running without lights, but then he did not observe any other violation of law. What was he doing there? What right did that give him to stay?" Here there was no
26 question of lights or anything. The boat was coming along Long Island Sound, going to the Fulton Street Market, she had a load of fish on, she tied up to the Fulton Street pier, and the Coast Guard says, "We will just watch, we are going to stick around until you unload the boat," and they go aboard the boat and tie the boat up.

The COURT. In the "Wylk" case we had a lumber cargo that was covering up a whole lot of stuff, and I allowed all the evidence in with regard to that, and it was confirmed by the Court of Appeals.

Mr. HALLE. There was something more in the "Wylk" case than the lumber. There was the evidence. Of course, I am trying only to recall.

The COURT. There was evidence that emerged later about someone being in Flori[illegible]—he has a shipyard.

Mr. HALLE. No, your honor, the lumber boat was—the men who were seized on the lumber boat and the—well, I can not talk about the case. I don't know about it.

The COURT. You see many things that come before me, but I remember distinctly about it because that was raised by Mr. Cahill at the time, and I said, "No, I thought that when they went aboard there and found that the captain was all alone, the crew had all left and they got this man Greenfall," who was a fine-looking chap, "and they got him there, and his crew had all gone ashore, and they found something was wrong with his papers," perhaps—I do not quite remember just what sort of boat it was, but certainly, whether I was right or wrong, I certainly ruled that way and it was affirmed.

27 Mr. HALLE. The question was raised, and, your honor, in a conspiracy case, everything would go in until the fabric is woven, but here is a single question. I would like to submit, if I may, one or two cases—the Conway case I am sure is with us, and so is the Gambino case.

The COURT. You mean that would effect the appropriateness of going after her for carrying something other than fish? If that is so, it could affect the libel directly, but then if it were held that the search and seizure were sufficient in this case, you get by that point, then you have the question of whether they ought not to have proceeded under the prohibition act rather than under this act.

Mr. HALLE. That is really the question, I see, so far. The other judges, except in the "Pilot" case, have all ruled——

The COURT. You mean the other judges except the "Pilot" case?

Mr. HALLE. I say those judges in the other cases, except in the "Pilot" case, proceeded under the prohibition act.

The COURT. You mean there have been a number of other cases. What do you mean by "except"?

Mr. HALLE. I mean this is the only case which has attempted to make a distinction.

The COURT. Oh, yes.

Mr. HALLE. And the Rushmeyer case is the "Pilot" case. Now, Judge Letts in the First Circuit, ruled that the libel should be dismissed.

The COURT. Of course, the "Pilot" case was really a direct decision against you, was it not? She was within two miles of the shore.

28 Mr. HALLE. Yes.

The COURT. She had liquor on board.

Mr. HALLE. Yes.

The COURT. And they allowed her to be prosecuted under the same section as the "Ruth Mildred."

Mr. HALLE. The man pleaded guilty under the smuggling statute. In this case he was arrested and charged with conspiracy to violate the national prohibition act, if I am correct.

The COURT. What happened to that?

Mr. HALLE. But nothing has happened to it.

The COURT. He has never been convicted, and you have never proceeded against for forfeiture under the national prohibition act, and it is not just like this other case, for there is a different statute involved. I assume that if this search and seizure was warranted then you have a situation where you have just exactly the same thing as in the "Sebostpol" case, in that there was not any question of search and seizure. They saw the whiskey aboard; they also saw her trying to sneak in. This vessel came in in the daylight, and the most suspicious situation here was the crew's attitude on getting off so rapidly, invoking alibis immediately.

Mr. SCHWARTZ. This exhibit adds to the story. I think that is the point we left off when we started to talk about this thing. I was trying to finish the stipulation. I think this would help some to get the whole story, and then we can go over it.

(Continuing reading from stipulation.) Soderberg was examined in the presence of J. J. Henry, customs agent, Col. Conroe, 29 chief inspector of the customs division, Deputy Surveyor McGill, Samuel Pollack, George Watson, officer in charge of the C. G. boat "148," and A. C. Deck, stenographer. The Government offers Exhibit No. 2 as the question given to the witness and his answers.

Mr. HALLE. Now, in the preliminary objection to this, I object for this reason, your honor: It appears that the captain was not properly warned of his rights. The question is as follows—it is put in the form of a question—"Captain, you know we are all customs officers and Coast Guardsmen. I believe your boat," it says, "has been carrying liquor. We want to warn you of your rights. Any question you do not want to answer you just have to say so, but what questions you answer you are to answer truthfully. Do you swear to tell the truth and nothing but the truth?" There is nothing here which warns the man of any question that he will answer, any statement that he might make, could be used against him. And it is a rather peculiar way of informing the man of his rights, and nothing is here telling him he has a right to have counsel or right to communicate with his friends—nothing at all.

There must have been quite a few of these customs officers and Coast Guardsmen, and he was all alone; and furthermore the question is rather peculiar in the light of this witness' testimony, where they say on March 2nd: "Captain, you know we are all customs officers and Coast Guardsmen. I believe your boat has been carrying liquor."

Mr. SCHWARTZ. Mr. Henry was asking the question. He was not present at the time of seizure.

30 Mr. HALLE. Evidently they were still in doubt about it.

The COURT. I do not know anything about that. I will admit it.

(Marked "Government's Exhibit 2" in evidence.)

Government's Exhibit 2

39–772

STATEMENT

March 2, 1928

In the matter of the seizure of the schooner "Ruth Mildred" with a cargo of 22 kegs of malt and 170 bags of rye whiskey, made March 2, 1928, at Fulton Fish Market, New York, N. Y.

Present: J. J. Henry, customs agent; Colonel Conroe, chief, inspection division; Deputy Surveyor McGill; Sam Pollak; George Watson, bo's' mate, C. G. "148," section base 4, New London, Conn.; Nils Soderberg, master, witness; A. C. Deak, stenographer.

J. J. HENRY:

Q. What is your full name?

A. Nils Soderberg.

31 Q. What is your present address?

A. 17 Elm Street, Gloucester, Mass.

Q. Are you married or single?

A. Single.

Q. Have you a home up there or just a furnished room?

A. Just a furnished room.

Q. Have you any other address, Captain?

A. No; I used to live in Brooklyn, a year ago.

Q. Do you own the schooner "Ruth Mildred"?

A. Yes, sir.

Q. Captain, you know we are all customs officers and Coast Guard men. I believe your boat has been carrying liquor. We want to warn you of your rights. Any question you don't want to answer you just have to say so, but what questions you answer you are to answer truthfully. Do you swear to tell the truth and nothing but the truth?

A. Yes, sir.

Q. How long have you owned the schooner "Ruth Mildred," Captain?

A. I owned her three years.

Q. Continuously during that time?

A. No; I sold it a year ago last spring and I had to take it back again.

Q. To whom did you sell the boat, Captain?

A. A fellow by the name of Jacob Johnsen.

Q. Where does Jacob Johnsen live?

A. In Boston.

Q. How did you meet Johnsen?

A. By coming down and asked if my boat was for sale.

Q. Did you have any particular reason for selling it to Johnsen at the time?

32 A. Yes, sir. I was disgusted with the men fishing in New York. You couldn't do nothing with them. I got disgusted and wanted to sell the boat very badly.

Q. And then somebody offered you a proposition to run liquor and you bought the boat back again?

A. No; not right away.

Q. How did you become involved in the liquor running business, Captain?

A. Well, I met a fellow and he asked if I wanted to take a load of liquor.

Q. When was this, Captain?

A. This was around New Years.

Q. Where did you meet this party, Captain; in the city here?

A. I met him through another fellow named Erickson.

Q. Do you know Erickson?

A. Not very particularly.

Q. You just met him through the fish business, or is he in the rum running game, too?

A. Yes, sir. Not that I know of.

Q. Do you recall the name of this party, Captain, that Erickson introduced you to?

A. All I know him by is Jack.

Q. What sort of a proposition did this Jack put up to you?

A. Well, I would get so much.

Q. On a commission basis?

A. So much a case.

Q. Was it Jack Rogers?

A. I couldn't tell you his last name.

Q. Can you describe this man, Captain?

A. Well, he is about your build (Henry).

33 Q. He is quite a bit older than me?

A. Not very much older.

Q. About 40 years old?

A. I don't think he is.

Q. 5' 10 or 11" tall?

A. Somewheres around that.

Q. Then what happened, Captain. Did he tell you where to pick up the load?

A. Yes, sir.

Q. Just what instructions did he give you in the deal, Captain?

A. Well, he sent another man with me as supercargo.

Q. Did this man go out to meet another vessel with you?

A. Yes, sir.

Q. And he stopped another right outside?

A. That is where I got the stuff for my vessel outside.

Q. After you met the other vessel he stayed on the other vessel?

A. Yes, sir.

Q. What was that man's name, Captain?
A. He called himself Anderson.
Q. Do you know anything about Anderson?
A. No. That is the first time I ever saw him.
Q. Do you know his first name?
A. No, sir.
Q. What did they just call him—Andy or Anderson?
A. Yes, sir. Andy or Anderson.
Q. What ship did you meet out there, Captain?
A. Well, I couldn't say the name, because the name was covered up.
Q. What time did you make the contact with this other vessel?
34 A. A week ago last Wednesday (the 22nd).
Q. What port did you sail from?
A. Newport, R. I.
Q. About what date?
A. The 13th, I think.
Q. Of February?
A. Yes.
Q. Anderson sailed with you from Newport?
A. That's right.
Q. And when you made the contact with the rum ship, Captain, where did you make the contact?
A. It was fifty miles southeast of Cultivator Shore.
Q. Then what did you do on your return trip, you come back alone with instructions from Anderson. Is that correct?
A. Yes, sir.
Q. What instructions did Anderson give you?
A. A boat would meet me in Long Island Sound.
Q. What kind of a boat was it, a small one?
A. It must have been a pretty large one.
Q. How were you to know the boat; Captain? How were you to identify it?
A. They were supposed to know us.
Q. Would you let any boat come alongside of you and say—did he have a password or something? How would he identify himself as taking the load?
A. Well, this Jack was supposed to be on board.
Q. On board this other boat that was going to meet you?
A. Yes.
Q. What happened?
35 A. He saw the Coast Guard following me and never showed up.
Q. Who paid for the load, Captain?
A. That is a thing I don't know.
Q. Probably Anderson?
A. That is a thing I don't know.
Q. How much cargo did you take on, Captain?

A. We have 222 kegs of malt and 170 bags of rye—12 bottles in each bag.

Q. Is that the entire cargo, Captain?

A. That is the entire cargo.

Q. How much fish have you, Captain?

A. About five or six thousand pounds.

Q. Where did you pick up the fish?

Q. On Georges Banks.

Q. You don't know any of the connections up in Halifax, do you?

A. No.

Q. You don't know where the load come from—Halifax or St. Pierr'?

A. I don't know that.

Q. How come you went into Fulton Market, Captain?

A. I had to go some place—the Coast Guard was chasing me.

Q. Will you explain Jack's original plan for the payment with you—when he was going to pay you?

A. I was to receive payment when I got the liquor off the vessel.

Q. Where did you meet this Jack—in a house or on the street?

A. I met him down at Fulton Fish Market.

Q. How many times did you meet him there before you decided to take the proposition?

36 A. Three or four times I saw him, I guess. I think so.

Q. I see a memorandum here (Louis Halle, 152 West 42 St., Wisconsin 1351—Endicott 7366—Did Jack give you that?

A. Yes, sir.

Q. What instructions did Jack give you when he gave you that?

A. If—I could get the connection if I happened to get pulled in to get connected with Louis Halle.

Q. Did you get in connection with him yet?

A. No, sir.

Q. You didn't talk to him on the telephone?

A. No, sir.

Q. Did you call Jack up?

A. Yes.

Q. What is his telephone number?

A. That is a question I don't want to answer.

Q. Is either one of these telephone numbers there his (referring to numbers on above memo)?

A. No.

Q. Did you call up Halle's office, Captain?

A. No, sir.

Q. How long were you off the ship from the time you docked until you came back to the boat?

A. To-day.

Q. Yes, this afternoon.

A. I was off about three times, when I went up in to the market.

Q. Who were you to sell your fish to, Captain?

A. When I was here before I had Chesebro, Hanson & Son, Bishop & Panna, New York Fish.

Q. Whom did you go to to-day, Captain, to sell your fish to?

A. Well, Hanson was giving me an offer to buy the fish to-day—all of it.

37 Q. Who is Mr. Buse, Captain?

A. I don't know him.

Q. Have you ever been in the rum running business before, Captain?

A. No, sir.

Q. Have you made any previous trips with rum on your boat before this one?

A. No, sir.

Q. What gave Erickson the idea you would take this load of booze in for Jack?

A. Well Erickson talked to me and I had a good mind to take a chance at it myself.

Q. Did Erickson tell you he got into a little jam with the customs a short time ago on his boat?

A. No, I never knew him before.

Q. You know the boat Erickson owns—the "America"?

A. No, I don't know Erickson well.

Q. He got into a jam—18 bottles were found on his boat before?

A. That is another Erickson?

Q. You know the Erickson who got into the jam?

A. I know the Erickson who had the "America," yes.

Q. This Erickson that gave the proposition to you—is he a boat captain?

A. Yes, sir.

Q. What boat does he own?

A. I don't know what boat he really had.

Q. What arrangements have you made, Captain? Are you going to meet Jack in the district attorney's office after this is over?

A. No, sir.

38 Q. Have you made any arrangements for bail?

A. No, sir.

Q. How much did Jack offer you for each bottle or case?

A. $10 a case.

Q. And how much for the kegs?

A. For the kegs—$25 for each keg.

Q. Has Jacob Johnsen any present interest in the boat?

A. No.

Q. Is this boat free and clear in your name, Captain?

A. Not free and clear, no. I have a mortgage on it.

Q. How big is the mortgage?

A. It is no real mortgage, it is a bill.

Q. Where was the vessel repaired, Captain?

A. In Gloucester.

Q. What yard?
A. The United Sale Loft.
Q. And Jacob Johnsen isn't connected with that outfit.
A. Not that I know of.
Q. What is the amount of the bill, Captain?
A. I guess it is about $9,000.
Q. For what kind of work, Captain?
A. Rigging, shipyard, and new sails, engine.
Q. Captain, can you describe the boat you met and got the liquor from?
A. Well, it was a schooner—like a fisherman—a good sized one—two-masted, I should judge about 140-150 ton.
Q. Did you meet it in the day time or night?
A. In the day time.
Q. Did you board the ship, Captain?
A. No, I didn't.
39 Q. This Anderson boarded it.
A. Yes.
Q. Did you have a crew list, Captain?
A. No, sir.
Q. How many men did you have in the crew, Captain?
A. Seven.
Q. Where did you sign them on?
A. We don't sign the men on.
Q. Where did you hire them?
A. I hired some in Gloucester, in Newport.
Q. Do you know their names?
A. I don't know their names.
Q. The names of any of them?
A. Not their full names.
Q. Are they new men?
A. Fishing boats change their men every trip.
Q. How long is the oldest man on?
A. Since New Year's.
Q. Where did you sign him on?
A. In Gloucester.
Q. Did you know his name?
A. His name is Charlie—that is all I know.
Q. Who did you have for a mate, Captain?
A. Have no mate—it is only a small boat.
Q. Who took charge of the boat when you weren't at the wheel, Captain?
A. There were two men on each watch.
Q. You set a course for them?
A. I set a course for them.
Q. Can you give us the first names of the crew?
A. Louis, I think one is—we called one fellow "Corn" for short, some name like Contelto or something like that.
Q. Contento?

40 A. Something like that. The engineer's name is Fred; the cook's name, I think is Rangveld.

WATSON:

Q. Have you paid your crew off?

A. No.

Q. You didn't know your crew was going ashore?

A. Yes; I told them they could go ashore because there were no fish—could go ashore.

Q. You seemed surprised when I told you your crew went ashore.

A. When you told me they took suit cases with them, I was.

HENRY:

Q. When were you in New York last, Captain?

A. Christmas.

Q. That is when you met Jack?

A. No; I met him before that.

Q. Where have you been since December, Captain?

A. Since December, I have had the boat up in Gloucester for repairing.

Q. How long were you laid up there, Captain?

A. I left Gloucester about the middle of January.

Q. You left Gloucester in the middle of January.

A. Yes.

Q. Then you were there only for a couple of days?

A. No; I was up in Gloucester for repairing.

Q. You were in New York New Year's.

41 A. No; I was in Gloucester, New Year's.

Q. Do you know where Erickson lives who introduced you to this Jack?

A. No; I don't know him.

Q. What kind of a looking man is he, Captain?

A. About 5′ 5″—pretty stout fellow around 185 lbs., I think.

WATSON:

Q. Do you know where your cook went ashore?

A. I had a fifty dollar bill—went up to change the fifty and give him the money.

Q. When I was talking to you your cook was aboard and he must have left immediately after that.

A. He must have left after that.

Mr. SCHWARTZ. One other thing: The "Ruth Mildred," which is named in the libel in this proceeding, which was filed on April 2, 1928, is the same "Ruth Mildred" for which a consolidated enrollment and license was issued at the port of Gloucester, Massachusetts, on July 13, 1927, which license was for cod and mackerel fishing, said license bearing the official number 222218.

Mr. HALLE. That is conceded, yes; that is true.

(Marked "Government's Exhibit 3" in evidence.)

Mr. SCHWARTZ. Do you want this enrollment and license to be part of the record?

42 It is agreed by counsel that a photostat would serve instead of the original.

The COURT. I should like to have the full statement of facts in.

Mr. HALLE. That statement of facts is all correct, that is, except that we still urge the search and seizure.

The COURT. Why do you not say without prejudice to the point about search and seizure, which is still insisted on, the parties agree on the summary stipulation of facts, consisting of three pages.

(Marked "Government's Exhibit 4" in evidence.)

Government's Exhibit 4

STATEMENT OF FACTS IN OPEN COURT

It is hereby stipulated and agreed by Louis Halle, proctor for the claimant, Nils Soderberg, and Robert E. Manley, United States attorney, proctor for the libellant, that the following is a true and accurate statement of the facts in the above entitled action.

The "Ruth Mildred" of Gloucester was duly licensed and enrolled by the Department of Commerce, Bureau of Navigation, on July 13, 1927, at the port of Gloucester, Massachusetts, to engage in the cod and mackerel fisheries. Said vessel is 82.0 feet in length, 21.5 feet in depth, and possesses the official number 22218.

The "Ruth Mildred" named in this libel proceeding is
43 the same "Ruth Mildred" as is described in the enrollment and license heretofore mentioned.

On March 1, 1928, the United States Coast Guard boat "148," under the charge of Coast Guard officer George Watson, was patrolling the eastern entrance to Long Island Sound. While in the vicinity of Race Rock, off New London, Connecticut, the schooner "Ruth Mildred" was observed proceeding under power to the westward. The master of the schooner told Watson he was bound for New York. The weather was partly cloudy, the visibility good, the wind moderate, and a southwest breeze. The sea was too rough to board the schooner during darkness. Watson wirelessed the patrol officer of Block Island and then proceeded to trail the schooner. Both vessels proceeded through Long Island Sound.

The "Ruth Mildred" tied up at a wharf at the foot of Fulton Street and East River about 11 a. m. on March 2, 1928. The Coast Guard boat was unable to come alongside the vessel until 11.15 a. m. because of the traffic conditions. At 11.15 a. m. Watson and members of the Coast Guard boarded the "Ruth Mildred." The master was not aboard. At about 1 p. m. the master returned and Officer Watson requested the ship's documents from the master. The master, Nils Soderberg, who is the claimant in this case, turned over the documents to Watson. Officer Watson stated that he would remain alongside the vessel until the cargo would be unloaded. When Officer

Watson made known this intention, Nils Soderberg stated "You've
gat a rummy this time," and admitted that he had liquor
44 aboard the ship, hidden under the fish cargo. In a conversa-
tion with Nils Soderberg, Officer Watson asked him how much liquor he had, and Soderberg said he was loaded to the gills, but did not admit how much he had. When asked where he got the liquor he said "in the vicinity of Georges Banks." The vessel was then seized, and with the aid of officers of the Customs Service a search of the vessel was made.

There were found aboard the "Ruth Mildred" 220 bags and 170 bags containing alcohol, liquor, and rye whiskey. Samples of this liquor were taken by members of the customs and the Coast Guards. They were labeled and sealed and then properly and regularly transmitted to the United States laboratory, appraisers stores, to be analyzed by the United States chemist. The analysis of the liquors found aboard the "Ruth Mildred" is that the liquids contained more than one-half of one per cent of alcohol by volume, and were fit for use for beverage purposes.

On March 2, 1928, Nils Soderberg was examined in the presence of J. J. Henry, customs agent, Col. Conroe, chief inspector of the division, Deputy Surveyor McGill, Same Pollak, George Watson, officer in charge of the Coast Guard boat "148," A. C. Deak, stenographer. The questions and answers are attached hereto as "Exhibit 1" and made a part hereof.

On April 2, 1928, a libel was filed against the "Ruth Mildred," seeking the enforcement of penalty and forfeiture of the vessel, on the ground that she violated the terms of her license, which pro-
vided for engagement in the fishing trade, whereas she was
45 found engaged in the illegal transportation and carriage of
intoxicating liquors, and thus in violation of the terms of her license (cf. sec. 4377 of the Revised Statutes). A claim and answer were filed by Nils Soderberg and the vessel was later released upon the filing of a bond in the sum of $10,000, said bond which was her full appraised value being placed in court as a substitute for the res.

Section 938 allows bonding in forfeiture, 28 U. S. C. §751.

The appraisal of the cargo found aboard the vessel is as follows:

Domestic value estimated at	$62,400
Foreign value estimated at	27,800
Boat	10,000

46 *Complaint*

The following is the complaint filed against Nils Soderberg before the United States Commissioner for the Southern District of New York:

Approved:

ROBERT B. WATTS,
Assistant United States Attorney.

Before: Honorable GARRETT W. COTTER, United States Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA, complainant

against

NILS SODERBERG, defendant

Violation of sec. 37, U. S. C. C. National pro. act, Oct. 28, 1919 and tariff act of Sept. 21, 1922

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George Watson, being first duly sworn, deposes and says, that he is chief boatswain mate, United States Coast Guard, appointed by and acting under the authority of the Treasury Department of the United States, and upon information and belief alleges and charges as follows:

That heretofore, to wit, beginning on or about January 1, 1927, and continuing on each and every day thereafter down to and
47 including March 2, 1928, in the Borough of Manhattan, Southern District of New York, within the jurisdiction of this court, Nils Soderberg, hereinafter called the defendant, did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree with divers persons to your deponent unknown, to commit an offense against the United States, that is to say, unlawfully to import and bring into the United States a large quantity of intoxicating liquor, containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, aboard and by means of the "Ruth Mildred," in a manner contrary to the requirements and otherwise than in accordance with the provisions of the national prohibition act of October 28, 1919, and the tariff act of September 21, 1922.

OVERT ACT

In pursuance of said conspiracy and to effect the objects thereof, the defendant Nils Soderberg did cause the "Ruth Mildred" to go to a point in the Southern District of New York and within the jurisdiction of this court on March 2, 1928, with a cargo of upwards of 170 bags of intoxicating liquor, containing more than one-half of one per cent of alcohol by volume and fit for use for beverage purposes; against the peace of the United States and their dignity and contrary to the form of the statutes of the United States in such case made and provided (section 37, U. S. C. C., national prohibition act of October 28, 1919; tariff act of September 21, 1922).

The sources of deponent's information and the grounds of his belief are official investigations made by your deponent in his
48 official capacity on board said "Ruth Mildred," and in the Borough of Manhattan, Southern District of New York.

Wherefore, your deponent prays that a warrant may issue for the apprehension of Nils Soderberg, that he may be arrested, imprisoned, or bailed as the case may be.

GEORGE WATSON.

Sworn to before me this 2nd day of March, 1928.

GARRETT W. COTTER,
United States Commissioner, Southern District of N. Y.

49 In United States District Court, Southern District of New York

UNITED STATES OF AMERICA, LIBELLANT

against

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," LENGTH 82 feet, beam 21.5 feet, depth 8.1 feet, Official No. 222218.

Order dismissing libel

Jan. 26, 1931

Present: Hon. JOHN M. WOOLSEY, United States District Judge.

This cause having come on to be heard for trial upon the pleadings and proofs and having been argued and submitted by the attorneys of the respective parties, and the court, after due deliberation having rendered its decision dismissing the libel herein, it is

Ordered, adjudged, and decreed that the libel herein be and the same hereby is dismissed without costs, and it is further

Ordered, adjudged, and decreed that (unless the libellant
50 perfects its appeal within the time prescribed by law), the stipulation for value in the sum of ten thousand ($10,000) dollars executed by the claimant herein and the Equitable Casualty and Surety Company, together with a stipulation for costs in the sum of two hundred fifty ($250) dollars be cancelled, and it is further

Ordered, adjudged, and decreed that if an appeal be taken, the execution of this decree shall be stayed and suspended until the determination of the appeal in this matter.

JOHN M. WOOLSEY,
U. S. D. J.

In United States District Court

Opinion

Re "Ruth Mildred"

WOOLSEY, District Judge.

These libels are dismissed, without costs.

I. The "Sebastopol," a trawler, of St. Johns, Newfoundland, was seized by Coast Guard officers of Coast Guard vessel "No. 145," on

August 11, 1927, in the Narrows, between the Upper and Lower New York Bays, at about 2.30 a. m. whilst masquerading under the name of the "Westmoreland," of Norfolk.

When the "Sebastopol" was boarded, a man named Donald McDonald, representing himself as her master, produced her
51 register, which gave her true name and home port as above, and, on being asked if he had cargo, admitted that he had a liquor cargo, which turned out, on examination, to contain 4,841 cases of Scotch whisky. She was then on a course that would take her as far as possible from quarantine. Thus apparently she hoped to avoid detection and get up to New York City.

The painting of her name plates and the appearance of their having been newly attached attracted the attention of the Coast Guards when they turned the searchlights of the "No. 145" on her.

When she was boarded, an open case of liquor was found in the pilot house. The ship's documents, some of which were discovered only after considerable search, consisted of her registry as above, an agreement and account with her crew, and a manifest which was false, in that it did not list the liquor cargo.

A variety of name plates were also found aboard, so she was prepared for almost protean transformations. She might be, at will, the "Sebastopol" of St. Johns, Newfoundland, the "May Emily" of St. Johns, Newfoundland, or the "Westmoreland," of Norfolk, Va.

The "Sebastopol" and her cargo of liquor, samples of which marked in evidence showed an illegal alcoholic content, were turned over to the customs. Her master and crew were charged in a complaint before a United States commissioner with violation of the national prohibition act.

By agreement, the foreign value of the cargo of Scotch
52 whiskey is fixed at $10 per case, making its total value $48,410. The vessel was appraised at $7,500.

A stipulation for value in this sum following the usual form has been filed, and the vessel has gone her way.

II. The vessel in the second case is the auxiliary schooner "Ruth Mildred." She is a vessel of the United States licensed from Gloucester, Mass., to engage in the cod and mackerel fisheries. She is 82 feet in length, 21.5 in depth, and her official number is 222218.

Shortly after midnight on March 1, 1928, the United States Coast Guard vessel, "No. 148," in charge of Coast Guard Officer George Watson, since deceased, was patrolling the eastern entrance of Long Island Sound. Whilst the "No. 148" was in the vicinity of Race Rock, off the coast near New London, Conn., she observed the "Ruth Mildred" proceeding under power to the westward. On being hailed, her master said she was bound for New York.

Although the visibility was good and the wind moderate, the sea was so rough as to make it impossible to board the schooner in the darkness. Accordingly, Watson, the captain of the "No. 148," knowing that the "Ruth Mildred" was under suspicion, sent a

wireless message to the patrol office of his service on Block Island, and was instructed by those there in charge to trail the schooner and watch her discharge.

Through the night the vessels proceeded—practically in company—westward through Long Island Sound, finally arriving in the latter part of the morning at the foot of Fulton Street, East
53 River, New York City, where the "Ruth Mildred" tied up at a wharf. The members of her crew were already on deck, and at once piled ashore. A few minutes later the Coast Guard vessel "No. 148" came alongside. By that time the whole crew of the "Ruth Mildred" had disappeared.

About 11.15 a. m. the captain of the "No. 148" and some of his crew went on board the schooner and found that even her captain had left her.

About 1 p. m. the captain of the "Ruth Mildred," who turned out to be Nils Soderberg, her owner and the claimant in this suit, came on board and showed his documents to the captain of the "No. 148."

In pursuance of his instructions, the captain of the "No. 148" stated that he would remain alongside the "Ruth Mildred" until her cargo was unloaded. When he made this intention known to the captain of the "Ruth Mildred," the latter said: "You have got a rummy this time," and "If that is the case I might as well tell you the truth. You have a good catch here. I am loaded up to the gills with liquor," which was a most felicitous metaphor, because his liquor cargo was hidden beneath a convenient veneer of fresh fish.

Subsequently when asked how much liquor he had on board, the captain of the "Ruth Mildred," though admitting she was fully loaded, did not state the amount of his cargo. When asked where he got the liquor, he said that he had secured it in the vicinity of "Georges Banks"—properly St. George's Banks—which are fishing banks about one hundred miles east of Cape Cod.

In view of this admission, the "Ruth Mildred" was seized, and subsequently a search was made.

54 On board her were found 220 boxes and 170 bags of rye whisky and other alcoholic liquor, of a potable quality, containing in excess of the legal one-half of 1 per cent of alcohol by volume.

The estimated foreign value of this liquor was $27,800 and the estimated value here was $62,400.

On April 2, 1928, a libel was filed against the "Ruth Mildred" to enforce penalties and forfeiture against her on the ground that she had become subject to forfeiture under section 4377 of the U. S. Revised Statutes (title 46, U. S. Code, § 325 (46 USCA § 325)), because she had violated the terms of her license, in that she had been found engaged in transporting intoxicating liquors within the territorial waters of the United States when she was licensed only to engage in the cod and mackerel fisheries.

The "Ruth Mildred" was duly appraised at $10,000, and was later released on the filing of a claim and answer by Nils Soderberg, her owner, and a stipulation for her full appraised value in the sum of $10,000.

III. The case of the "Ruth Mildred" differs from the case of the "Sebastopol" in two respects only: First, in the fact that it is contended that search and seizure of the "Ruth Mildred" was illegal, as not being founded on reasonable grounds; and, second, in that she is a vessel of the United States, and the statute invoked for her forfeiture is a statute, title 46, U. S. Code, § 325 (46 USCA § 325), applying to vessels registered, enrolled, or licensed in the United States requiring them to confine themselves to the trade for which they are licensed.

55 Whilst these cases were not tried together, they are submitted together, and a single opinion will serve for the disposal of both.

IV. Before proceeding to the main question, there are some futile contentions made by both the parties which have to be met and put aside.

These contentions and my comments thereon are as follows:

[1] A. The claimant of the "Ruth Mildred" contends that there was an illegal search and seizure in that case.

I hold that the seizure of the "Ruth Mildred" was justified. There was not any search, legal or illegal, if one uses that word to mean an act precedent to, and resulting in, a seizure.

A search was forestalled by the confession of her captain, above noted, that the "Ruth Mildred" was a rum runner. Such a confession justified the seizure and made a search unnecessary just as a plea of guilty justifies a sentence and makes a trial unnecessary.

The reason for this is, of course, that, by his confession, the suspect and, by his plea of guilty, the prisoner, definitely elects not to stand on his constitutional rights, and so expressly waives them.

Surely after such a confession as was here made the most enthusiastic champion of the Bill of Rights would not seriously contend that a government officer engaged in law enforcement should at once withdraw on constitutional grounds and seek a search warrant from the nearest United States commissioner. As Judge

56 Coleman aptly remarked in another connection where a claim of illegal search had been put forward, that "Common sense is not barred by the fourth and fifth amendments." In re Kips Bay Brewing & Malting Co. (D. C.) 29 F. (2d) 836, 837.

B. The government contends, with what relevancy does not clearly appear to me, that I should take into consideration in dealing with these cases that executive clemency is often extended to innocent victims of forfeiture.

The consideration was urged in the Government's brief before the Circuit Court of Appeals for the Fourth Circuit in the case of "The Pilot," 43 F. (2d) 491, and was mentioned by Judge Northcott in his opinion at page 493.

My answer to this contention does not interest me, because I am dealing with rights under the law and not with possible clemencies.

[2] C. The Government also contends that, by filing stipulation for value, the claimant waived the right to contend that the libels are brought under the wrong statutes.

My answer to that contention is that, if the owner of property proceeded against in rem files a stipulation for value under the common practice here or a bond for double the amount of the libelant's claim under title 28, U. S. Code, § 754 (28 USCA § 754), or section 26 of title 2 of the national prohibition act (27 USCA § 40), he does not waive any defense which may be available to him.

57 Chief Justice Waite, sitting here on circuit, said in The Fidelity, 16 Blatchf. 569, 8 Fed. Cas. 1189, at page 1192, No. 4758:

"The stipulation filed to obtain the release of the tug is not a waiver of the question as to the original liability of the tug. The stipulation takes the place of the vessel, and, for all the purposes of the trial, the case goes on as if the vessel were itself in court."

To the same effect also are "The Monte A" (D. C.) 12 F. 331, 335; "The Berkeley" (D. C.) 58 F. 920, 922, 923; "The Lisbon," 3 F. (2d) 408, 409 (C. C. A. 9).

[3, 4] V. After the "Sebastopol" was tried before me in December, 1929, and whilst it was under advisement, I was requested by both parties to hold up my decision pending a decision by the Supreme Court in the case of Richbourg Motor Co. v. U. S. and Davies Motor Co., Inc. v. U. S., hereafter referred to as the Richbourg case, which was then awaiting argument in the Supreme Court on the ground that the decisions in those cases would probably control these cases.

These decisions went against the Government, Richbourg Motor Co. v. U. S., 281 U. S. 528, 50 S. Ct. 385, 74 L. Ed. 1016, and now the Government contends that they do not govern my decision in these cases, whilst the counsel for the steamship adheres to his original position that they do.

VI. The only difference between the Richbourg case and these two cases is that in the Richbourg case the forfeiture of the automobile involved was sought under Revised Statutes, § 3450, now

58 title 26, U. S. Code, § 1181 (26 USCA § 1181), whilst here the penalties in the "Sebastopol" case and the forfeiture in the case of the "Ruth Mildred" are sought under other provisions of the statutes.

The basis of the libel against the "Sebastopol" is section 584 of the tariff act of 1922 (title 19, U. S. Code, § 486 [19 USCA § 486]), dealing with the falsity or lack of manifests on vessels, and prescribing penalties to the amount of the value of the merchandise if it be not manifested. Section 594 of the said tariff act (title 19, U. S. Code, § 498 [19 USCA § 498]), prescribes the method of collection of the penalties by holding the vessel as security.

Section 498 of title 19, U. S. Code (19 USCA § 498), reads as follows:

"Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same."

The "Sebastopol," therefore, was in effect surety for her master's payment of the penalties incurred by false manifest, and, as such, she was libeled, and thereafter, as above mentioned, a stipulation in the usual form for her full agreed value was filed.

Forfeiture of the "Ruth Mildred" is sought under Revised Statutes, § 4377, which stems back to the act of Feb. 18, 1793, c. 8,
59 § 32, and is now section 325 of title 46 of the United States Code (46 USCA § 325). That section provides:

"Penalty for violation of license. Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever."

Section 26 of title 2 of the national prohibition act (title 27, U. S. Code, § 40 [27 USCA § 40]), is the act under which the respective claimants contend their vessels should have been libeled. That section reads as follows:

"Unlawful transportation of liquor; seizure and destruction of liquor and sale of vehicle. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or auto-
60 mobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the per-

son so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceedings brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or
61 automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts."

VII. Whether section 26 of title 2 of the national prohibition act is the paramount provision of law when it is the alternative basis of a forfeiture to one of the two other statutes above quoted is the subject of my inquiry here.

The question is as to the applicability of one law or another to a given set of circumstances, and involves, therefore, the form of a punitive remedy rather than any matter of substantive law.

There is not any decision of the Supreme Court which deals with these precise statutes, but there are two indications of what its expectable attitude would be on the principles involved.

The first is in a concurring opinion by Mr. Justice Butler, concurred in by Mr. Justice Stone, in Port Gardner Co. v. United States, 272 U. S. 564, 567, 47 S. Ct. 165, 71 L. Ed. 412, and the second in Richbourg Motor Co. v. United States, 281 U. S. 529, 50 S. Ct. 385, 74 L. Ed. 1016, a case where the facts so differed from Port Gardner case as to enable the dissentients in the earlier case to find a text for their views.

62 Mr. Justice Butler, dissenting, in the Port Gardner case, 272 U. S. 564, said at page 567, 47 S. Ct. 165, 166, 71 L. Ed. 412 (italics mine):

"But it leaves open the question which is not decided in No. 115 [U. S. v. One Ford Coupe Automobile] 272 U. S. 321, 47 S. Ct. 154, 71 L. Ed. 279 [47 A. L. R. 1025]. The substance of that question

is whether the prohibition officer, discovering one in the act of transportation, may disregard the plain and direct commands of section 26 to proceed against the vehicle as there directed. *I think he has no more right to ignore that command than he has to let the liquor and offender go. The law makes the election.* I regret that this court's answer is so qualified and restricted. Section 26 is not so restrained."

In Richbourg Motor Co. v. United States and Davies Motors, Inc. v. United States, 281 U. S. 528, 50 S. Ct. 385, 74 L. Ed. 1016, automobiles had been seized for the unlawful transportation of intoxicating liquor. The Government sought forfeiture of the automobiles under title 26, U. S. Code, § 1181 (26 USCA § 1181), formerly Revised Statutes, § 3450, which authorizes forfeiture of vehicles used in the removal or concealment of any commodity with intent to deprive the United States of a tax due thereon.

Two district courts had allowed the forfeitures, and the Circuit Court of Appeals for the Fourth and Ninth Circuits [34 F. (2d) 38; 35 F. (2d) 928], had affirmed the courts below.

On certiorari, the Supreme Court reversed both decisions, and said, through Mr. Justice Stone, at page 535 of 281 U. S., 50 S. Ct, 385, 388:

63 "The objective of title 2, § 26, is not the prosecution of the offender, elsewhere provided for, but the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, to the limited extent specified in the section. Every act which it enjoins on public officials is directed to that end.

"In providing for forfeitures under this section Congress was not unaware that the enactment of the national prohibition act would enormously increase seizures of vehicles, beyond those made under section 3450 (26 USCA § 1181), and that their forfeiture would place an increased and heavy burden on many innocent persons, unless afforded some protection by the new legislation. By title 2, § 26 (27 USCA § 40), it gave such protection in all cases where the prosecution of the person guilty of the transportation is had under the national prohibition act. This would have been but an idle gesture, and the congressional purpose would have been defeated if, in practically every case where the transporting vehicle is seized, the prosecuting officers could compel forfeiture of the interests of innocent third persons under section 3450 (26 USCA § 1181). Yet that is the effect of the construction of title 2, § 26, contended for by the Government, since, with the enactment of national prohibition, there can be few cases of illegal transportation which do not involve the concealment of non-tax-paid liquor. See United States v. One Ford Coupe, page 326 of 272 U. S., 47 S. Ct. 154, 71 L. Ed. 279, 47 A. L. R. 1025.

64 "We think that Congress did not take the precaution to enact the carefully chosen language of section 26 merely to impose general duties on prosecuting officers already placed on them by other sections of the act, but that its purpose was to

preclude the nullification of the protection which section 26 had extended to innocent third persons.

"This court has already held that the provision in section 26 that 'the court upon the conviction of the person so arrested shall * * * order a sale by public auction of the property seized' is mandatory and requires the forfeiture to proceed under that section. Port Gardner Investment Co. v. United States, supra [272 U. S. 564, 47 S. Ct. 165, 71 L. Ed. 412]; Commercial Credit Co. v. United States, supra [276 U. S. 226, 48 S. Ct. 232, 72 L. Ed. 541]. No tenable ground of distinction is suggested which would enable us to say, where forfeiture is involved that the preceding requirement of the section, that the proceedings against the person arrested 'shall be under the provisions of this title,' is any less so."

Then, after dealing with the legislative history of section 26 of title 2 of the national prohibition law, Mr. Justice Stone summarizes the decision of the court thus at page 536 of 281 U. S., 50 S. Ct. 385, 388:

"We are of opinion that under title 2, § 26 (27 USCA § 40), it is the duty of prohibition officers to arrest any person discovered in the act of transportation and to seize the transporting vehicle; that such arrest and seizure require the Government to proceed for forfeiture of the vehicle under title 2, § 26. It is unnecessary to say whether, if for any reason the seizure cannot be made or the
65 forfeiture proceeded with, prosecution for any offense committed must be had under the national prohibition act rather than other statutory provisions."

VIII. When a vessel of such comparatively small value as the "Sebastopol" is transporting a cargo of large value, its seizure for the enforcement of penalties provided by section 584 of the tariff act of 1922 results in the loss of the vessel to her owner—as devastating to an owner as a forfeiture, even if not so called—and equally unfair, if that owner be innocent.

So the fact that, as is agreed by the Government, the "Sebastopol" libel is for a penalty instead of a forfeiture, makes no difference to me, unless I am willing to "stick in the bark"—a surface operation which I always try to avoid.

Consequently, the "Sebastopol" case must follow the principle of the Richbourg case, unless the fact that the tariff act was passed subsequently to the national prohibition act makes a difference in the situation.

On September 19, 1930, subsequently to the decision of the Richbourg case, the Circuit Court of Appeals for the Fourth Circuit in "The Pilot," 43 F. (2d) 491, held at page 493 that the tariff act of 1922 is not "controlled" by the prohibition act of 1919, and reversed a decision dismissing a libel brought for customs penalities under sections 584 and 594 of the tariff act of 1922 against a vessel caught within the three-mile limit carrying a cargo of liquor.

No one could properly claim that the tariff act, §§ 584 and 594, repealed, by implication, section 26 of title 22 of the national

66 prohibition act providing forfeiture of the vehicle in any case where liquor was found being transported and as, therefore, section 26 of title 2 of the prohibition act is still in full force, we have that section making it a duty, when liquors of unlawful alcoholic content are found being transported within the territory of the United States, to proceed against the carrying vessel or vehicle in a special manner by steps which are detailed in that section.

Naturally, the tariff act covers different offenses from those dealt with by the prohibition act. I think that sections 584 and 594 of the tariff act of 1922 are partly extraterritorial in their ambit, for those sections fall within the category of protective measures which may be exercised outside of the three-mile belt of waters which constitute our marginal sea. Cf. tariff act of 1922, § 581 (title 19, U. S. Code, § 481 [19 USCA § 481]); "The Mistinguette" (D. C.), 14 F. (2d) 753; and United States v. Bengochea, 279 F. 537 (C. C. A. 5).

Section 26 of title 2 of the national prohibition act is, however, purely territorial in its ambit, and illegal transportation of liquor would not be possible outside the marginal sea. Cunard Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306.

The two acts overlap, consequently, within the outer limits of the marginal sea of the United States, and within such limits, by its direct and specific terms as interpreted by the Supreme Court, section 26 of title 2 of the national prohibition act is the paramount statute.

67 Consequently, if the "Sebastopol" had been captured outside the three-mile limit, this libel would have to be sustained, for the only offense then chargeable would have been a false manifest.

But, as she was seized within the three-mile limit, she was guilty, not only of false manifesting, but of transportation of intoxicating liquor. The reason for the first-mentioned offense was to cloak the second.

The purpose of the Government is to punish the vessel for the second offense by invoking against her the penalties of the first, which is more easily proved, perhaps, because it does not require, as a condition precedent to its success, the conviction of the person in possession of the vessel, and, in any event, carries under the name of penalty a punishment as drastic against the owner of a small ship, guilty or innocent, as section 26 carries against the guilty only. Cf. "The Pesaquid" (D. C.) 11 F. (2d) 308.

The case of United States v. The Brig "Malek Adhel" (Harmony v. U. S.), 2 How. 210, 233, 11 L. Ed. 239, in which the master turned pirate, is the classic case of the forfeiture of a vessel when its owner was obviously innocent of the offense for which it was forfeited. From the date of that case until the enactment of section 26 of title 2 of the national prohibition act, so far as I am aware, all forfeiture statutes cut off innocent owners of and lienholders on

the vessel from assertion of their claims. Cf. "The Pilot" (C. C. A.) 43 F. (2d) 491, 493.

As Mr. Justice Stone pointed out in the quotation above given from the Richbourg case, section 26 was aimed at remedying this injustice.

68 The Government should, I think, in view of the oft-repeated homilies of our criminal law, be astute to save the innocent from injury.

IX. In the case of the "Ruth Mildred," which involves the control by our Government of its domestic vessels, the libel is for a forfeiture brought under title 46, U. S. Code, § 325 (46 USCA § 325), for breach of her license as a fishing vessel. That statute does not recognize innocent owners or lienors.

If it be objected that the master of the "Ruth Mildred" is her owner, and confessedly is not innocent, my answer is that we do not know what innocent persons may have liens by way of mortgage or otherwise on her, and that a wrong remedy should not be allowed to be maintained merely because her owner may be guilty.

[5–7] X. In situations such as we have here, where proceedings in rem against vessels are involved, if their owners come into court as claimants thereto, they come in as actors in the proceeding, for they are in effect petitioners asking for a favor—to have their ships returned to them. United States v. 422 Casks of Wine, 1 Pet. 547, 549, 550, 7 L. Ed. 257. On such a petition the burden is on them to show their ownership, their present right to possession of the vessel, "The R. W. Skillinger," 1 Flip. 436, 21 Fed. Cas. 102, 103, No. 12,181, and, in the case of a forfeiture proceeding under section 26 of title 2 of the national prohibition act, their innocence of complicity in the acts for which the forfeiture is sought. Cf.

69 United States v. One Hundred and Twenty-Nine Packages, 27 Fed. Cas. 284, 285, 286, No. 15,941.

[8] At this point in any case in rem issue may be joined under a practice long familiar to determine the claimant's locus standi. United States v. 422 Casks of Wine, 1 Pet. 547, 549, 550, 7 L. Ed. 257; "The Two Marys" (D. C.) 10 F. 919, 920, 928; The Steamer "Spark" v. Lee Choi Chum, 1 Sawy. 718, 22 Fed. Cas. 871, 873, No. 13,206; "The Prindiville," 1 Brown's Adm. 487, 19 Fed. Cas. 1345, 1346, No. 11,435; United States v. One Hundred Barrels of Cement, 27 Fed. Cas. 292, 293, No. 15,945.

If issue were so joined, for example, in a libel for forfeiture against the "Ruth Mildred" under section 26 of title 2 of the national prohibition act, it is obvious that her owner could not show his innocence—and, unless an innocent lienor turned up, the libel for forfeiture would go by default.

XI. It is clear that in both these cases the breach of the national prohibition act was the reason for the proceedings against the vessels.

The Government did not go it blind in these cases, and never has to; for obviously it can not be ascertained whether a vessel's cargo

is or is not properly manifested until its nature and quantity is determined, nor can it be told whether a vessel's loading is in violation of its license until the nature of its cargo is determined.

When the facts involved are thus discovered, if the vessel is known to have been engaged in transportation within our territorial waters, and if her cargo be found to contain alcoholic beverages of
70 more than the legal alcoholic content, a violation of the national prohibition act is made out, and the persons on board her are punishable thereunder criminally, and, unless the criminal proceeding is unsuccessful, as in United States v. 2180 Cases of Champagne, 9 F. (2d) 710, 712, 713 (C. C. A. 2), there follows forfeiture of the offending vessel.

From the decision of the Supreme Court in the Richbourg case, I think it is clear that, if forfeiture of the vessel is sought under such circumstances as we find in these two cases, it should be sought under section 26 of title 2 of the national prohibition act in order that the innocent owner of or lienor on the vessel may not be victimized as an incident to the operation and enforcement of that important sumptuary edict.

To proceed under another statute in the face of the specific instructions contained in section 26 of title 2 of the national prohibition act seems to me to imply nothing less than a ruthless disregard on the part of the Government of the possible property rights of innocent parties.

Decrees in accordance with this opinion may be submitted for signature in each of these cases on two days' notice.

71 In United States District Court

(Title omitted.)

Assignments of error

Comes now the United States of America, the appellant herein, and files the following assignments of error, upon which it will rely upon for the appeal from the final decree made and entered herein on January 27, 1931:

I. The court erred in making and entering the decree appealed from.

II. The court erred in holding that the filing of a stipulation for value by the claimant, Nils Soderberg, did not waive the right to contend that the libels were brought under the wrong statute.

III. The court erred in finding that the libellant had failed to prove a violation of section 4377 of the Revised Statutes (46 U. S. Code 325).

72 IV. The court erred in finding that the libellant did not prove the cause of forfeiture under section 4377 of the Revised Statutes (46 U. S. C. 325).

V. The court erred in finding that the provisions of the national prohibition act of October 28, 1919, superseded the provisions of

section 4377 of the Revised Statutes of the United States (46 U. S. C. 325).

VI. The court erred in finding that section 26 of the national prohibition act of October 28, 1919, was paramount and mandatory as an alternative basis of forfeiture to section 4377 of the Revised Statutes.

VII. The court erred in finding that when, in the discovery of the violation of section 4377 of the Revised Statutes, the transportation of liquor was also involved, that the libellant was compelled to proceed under the provisions of the prohibition act of October 28, 1919, section 26, governing forfeiture of vehicles for transportation of intoxicating liquors, to the exclusion of section 4377 of the Revised Statutes.

VIII. The court erred in failing to deny the motion to dismiss the libel at the close of the libellant's case.

Wherefore, appellant pr[illegible] that the final decree of the United States District Court be reversed and a decree entered order-
73 ing a forfeiture under section 4377 of the Revised Statutes (46 U. S. C. 325).

Dated, New York, February 21, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the
Southern District of New York,
Solicitor for Appellant.

Old P. O. Building, Broadway and Park Row, New York City.

In United States District Court

(Title omitted.)

Notice of appeal

SIR: Please take notice that the libellant, United States of America, hereby appeals to the United States Circuit Court of Ap-
74 peals for the Second Circuit, from the final decree signed by the Hon. John M. Woolsey, one of the judges of this court, and entered herein on January 27, 1931, and that the libellant hereby appeals from each and every part of said decree as well as the whole thereof.

Dated, New York, February 21, 1931.

Yours, etc.,

GEORGE Z. MEDALIE,
United States Attorney,
Southern District of New York,
Proctor for Libellant.

To LOUIS HALLE, ESQ.,
Proctor for Claimant,
152 West 42nd Street, Borough of Manhattan, City of New York.

Clerk of the District Court of the United States for the Southern District of New York.

75 In United States District Court

(Title omitted.)

Petition for leave to appeal

To the honorable Judges of the United States District Court for the Southern District of New York:

Comes now the United States of America, by their solicitor, Robert E. Manley, acting United States attorney for the Southern District of New York, and feeling aggrieved by the final decree made and entered herein on January 27th, 1931, by this court, complained that in the record and proceedings had in such cause manifest error has happened, to the great damage of the petitioners, as set forth in the assignments of error annexed hereto.

Wherefore, the libellant, the United States of America, does hereby appeal from said final decree of this court to the Circuit Court of Appeals for the Second Circuit, and prays that its appeal
76 may be allowed, and the papers upon which said decree is made, duly authenticated, be sent to the Circuit Court of Appeals for the Second Circuit, and that the same may be corrected; and it is further prayed that an order be made herein that pending the hearing and final determination of the appeal in the above entitled proceedings and the entry of the order on mandate, the execution of this decree by the claimant or his proctor be stayed and the discharge and cancellation of the bond be stayed.

Dated, New York, February 21, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York,
Attorney for Petitioner.

Old P. O. Building, Broadway and Park Row, New York City.

77 In United States District Court

(Title omitted.)

Order allowing appeal

The libellant in the above-named libel, feeling aggrieved by the final decree entered herein on the 27th day of January, 1931, does hereby appeal from the said final decree to the United States Circuit Court of Appeals for the Second Circuit, and prays that this appeal may be allowed.

And now, on this 21st day of February, 1931, it is

Ordered that the appeal be allowed as prayed for, and

It is further ordered that pending the hearing and final determination of the appeal in the above-entitled action and the entry of an

order on mandate, the claimant and his proctor are hereby stayed from executing the decree in this case, and

It is further ordered that the discharge and cancellation
78 of the bond are hereby stayed pending the hearing and final determination of the appeal in the above-entitled action and the entry of an order on mandate.

WM. BONDY,
U. S. D. J.

In United States Circuit Court of Appeals, for the Second Circuit

(Title omitted.)

Order dispensing with printing of exhibits

Upon reading and filing the annexed consent and on the motion of George Z. Medalie, proctor for the libellants, it is

Ordered that the following exhibits need not be printed, but that the originals or photostatic copies thereof may be referred to upon the arguments in this court, with the same force and effect as though printed in the record:

79 Government's Exhibit I—Map indicating point of seizure.
Government's Exhibit III—Enrollment and license of the "Ruth Mildred."

September 22, 1931.

MANTON,
U. S. C. J.

We hereby consent to the entry of the foregoing order.
Dated, New York, September 22, 1931.

GEORGE Z. MEDALIE,
United States Attorney,
Proctor for Libellant.
LOUIS HALLE,
Proctor for Claimants.

80 (Citation in usual form omitted in printing.)

81 In United States District Court

(Title omitted.)

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled action as agreed upon by the parties.
Dated, New York, December 2, 1931.

GEORGE Z. MEDALIE,
United States Attorney,
Proctor for United States, Libellant.
LOUIS HALLE,
Proctor for Claimant.

82 (Clerk's Certificate to foregoing transcript omitted in printing.)

83 In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, LIBELLANT-APPELLANT

against

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," LENGTH 82 feet, beam 21.5 feet, depth 8.1 feet, official No. 222218, claimant-appellee

Order to show cause

Filed Feb. 5, 1932

Upon the annexed affidavit of Arthur H. Schwartz, Assistant United States attorney, duly verified the 3d day of February, 1932.

Let the claimant, Neils Soderberg, show cause at a stated term of this court to be held in Room 435 of the United States post office building in the Borough of Manhattan, city, county, and State of New York, on the 5th day of February, 1932, at 10.30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why the questions of law involved in the above-entitled matter should not be certified to the United States Supreme Court by the Circuit Court of Appeals for the Second Circuit.

Let service of a copy of this order and affidavit upon which the same is granted, made on the claimant, Neils Soderberg, or his attorney, Louis Halle, on or before February 4, 1932, be deemed sufficient service.

Dated New York, February 3, 1932.

(Signed) MANTON,
U. S. C. J.

84 In United States Circuit Court of Appeals for the Second Circuit

(Title omitted.)

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Affidavit of Arthur H. Schwartz

Filed Feb. 5, 1932

ARTHUR H. SCHWARTZ, being duly sworn, deposes and says:

I am an assistant United States attorney for the Southern District of New York and in charge of the above-entitled action.

The case of United States v. Two Masted Auxiliary Schooner "Ruth Mildred" is an appeal pending in this court bearing the calendar number 280. The record has been filed but no briefs submitted at this date. The basic question to be argued is:

"When a vessel is seized within the territorial waters of the United States in the act of transporting beverage liquor and persons

found in control of the vessel are arrested and arraigned before the United States commissioner on the offense of conspiracy to violate the provisions of the national prohibition act and the tariff laws, are the forfeiture provisions of section 26 of title 2 of the national prohibition act exclusive so that the United States is precluded from invoking the applicable forfeiture provisions of the navigation laws?"

This is an application to have this question certified to the United States Supreme Court from this Circuit Court of Appeals.

In the case of United States v. Two Masted Auxiliary Schooner "Ruth Mildred," Honorable John M. Woolsey, United States district judge, dismissed a libel of information after a trial and filed an opinion. The libel of information set forth causes of forfeiture under sections 4377, 4320, and 4321 of the Revised Statutes of the United States. Proof in the case is sufficient to support the causes of forfeiture. The defendant in charge of the vessel was arrested
85 and arraigned before a United States commissioner for the offense of conspiracy to violate the national prohibition act and the navigation laws of the United States. Judge Woolsey held that section 26 was mandatory and that forfeiture must be had under section 26 of the national prohibition act.

At the present time there is pending in the United States Supreme Court the case of General Motors Acceptance Corporation v. United States upon the certificate from the Circuit Court of Appeals for the Ninth Circuit. In this particular case the question is whether there is a conflict between section 26 of the national prohibition act and sections 3061–3062 of the Revised Statutes (19 U. S. C. 482–3). The issue in that case was decided in the lower court favorably to the United States. The same question was also involved in Commercial Credit Co. v. United States, which was decided adversely to the United States by the Circuit Court of Appeals for the Fifth Circuit. I am advised that certiorari has been granted in this case also. Both these cases involve the seizure of an automobile engaged in smuggling liquor.

In view of the fact that the United States Supreme Court will be called upon to pass upon a question in which there is great doubt as a result of varying decisions throughout the various Federal courts, and in view of the fact that the issue in this case should be presented to the United States Supreme Court at the same time as the two cases pending before it, the appellant respectfully prays that the question in this case be certified to the United States Supreme Court. Deponent appends hereto a short statement of facts in the case of United States v. Two Masted Auxiliary Schooner "Ruth Mildred" with reference to the record in this court.

For the reason aforesaid, your deponent prays for an order to show cause requiring the claimant-appellee to show cause why said questions should not be certified to the United States Supreme Court. The reason an order to show cause is prayed for in place

of and instead of the regular notice of motion is that the cases now pending in the United States Supreme Court are expected to be argued by March, 1932; and if this question should be certified, sufficient opportunity should be afforded to prepare the briefs and facilitate the disposition of these matters at an early date.

ARTHUR H. SWARTZ.

Sworn to before me this 3d day of February, 1932.

[SEAL.] C. M. CONLAN,

Notary Public, Bronx Co. No. 77 Reg. 63–C–33.

Cert. filed in N. Y. Co. No. 493 Reg. 3–C–341. Commission expires March 30, 1933.

86 In United States Circuit Court of Appeals

(Title omitted.)

Statement of facts

This is a companion appeal to the British steamship "Sebastopol," being an appeal from a final decree (fol. 145–149), dismissing the libel of information (fol. 7–15), against the vessel "Ruth Mildred" for breach of the provisions of sections 4377, 4320, and 4321 of the Revised Statutes of the United States. After a trial before Honorable John M. Woolsey, United States district judge, an opinion was rendered by the court (fol. 149–210). The record of the facts was elicited both at trial (fol. 28–125) and by stipulation (fol. 125–135) between counsel.

FACTS

Shortly after midnight March 1st an officer of the Coast Guard aboard the CG "148" sighted the "Ruth Mildred" between Race Rock and Little Gull (fol. 32). This point is in the Long Island Sound (fol. 34). This vessel was on the suspicious list and the Coast Guard had orders to keep an eye out for it (fol. 31). The Coast Guard trailed along and upon putting the light on the vessel found it to be the "Ruth Mildred" (fol. 35–36). The captain of the "Ruth Mildred" was called and asked where he was bound for and he said for New York (fol. 36–37). The Coast Guard base was called and orders were received to follow the "Ruth Mildred" until the cargo was discharged (fol. 37). The vessel was therefore followed into New York to a fish dock located in the Fulton Street Market (fol. 38). Immediately upon arriving at the dock the lines were made fast and the whole crew left, including the master. Five or ten minutes later the master returned (fol. 38–39). The crew
87 never came back, leaving their clothes and belongings (fol. 40). The master, Nils Soderberg, was asked about his trip, and he said he had made out "pretty good" (fol. 41). He was then told that the Coast Guard would stand by until the cargo had been discharged (fol. 41).

Soderberg then said that he did not intend to unload his fish until Monday. The Coast Guard officers aboard the boat went down to examine the engines and while looking at them Soderberg told them that he was loaded down to the gills with liquor and admitted having an illicit cargo (fol. 44) and asked "What would it be worth to you to pull away and leave?" The boat was not then examined for liquor until the next morning when the customs officials came in (fol. 46-47). In addition to some fish which were on top, liquor was found in the vessel (fol. 48). Upon cross-examination the witness testified that they followed the "Ruth Mildred" keeping her in view (fol. 50), and that when the vessel came to a stop the Coast Guard officer went aboard the "Ruth Mildred" (fol. 50). When boarding the vessel they were looking for violations of the Volstead Act (fol. 51) and were "suspicious of the cargo of liquor" (fol. 52). When the vessel was boarded at the dock the officers of the Coast Guard were looking for any violations of any kind (fol. 55). These violations could be of several types, such as lights or license (fol. 63).

It was stipulated that there was seized aboard the "Ruth Mildred" 200 bags and 170 bags containing alcohol, liquor, and rye whiskey which contained more than one-half of one per cent of alcohol by volume and were fit for use for beverage purposes. The officers of the customs procured a statement from the captain, Neil Soderberg, relating to his having picked up the cargo of liquor.

The cargo seized had a foreign value estimated at $27,800, and the vessel itself is appraised and released for a bond in the sum of $10,000.

The charges filed against Neil Soderberg were in the form of a complaint before the United States commissioner charging a violation of section 37 of the United States Criminal Code for conspiring to violate the tariff act of 1922 and the national prohibition act.

(File endorsement omitted.)

88 In United States Circuit Court of Appeals Second Circuit

(Title omitted.)

Order denying motion to certify certain questions

Filed Feb. 13, 1932

A motion having been made herein by counsel for the appellant to have this court certify certain questions to the Supreme Court of the United States;

Upon consideration thereof it is

Ordered that said motion be and hereby is denied.

WM. PARKIN, *Clerk.*

89 (Filed endorsement omitted.)

90 In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, libellant-appellant

vs.

BRITISH S. S. "SEBASTOPOL," HER ENGINES, TACKLE, APPAREL, AND furniture, etc., claimant-appellee

UNITED STATES OF AMERICA, libellant-appellant

vs.

TWO MASTED AUXILIARY SCHOONER "RUTH MILDRED," LENGTH 82 feet, beam 21.5 feet, depth 8.1 feet, Official No. 222218, claimant-appellee

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

Appeals from the District Court of the United States for the Southern District of New York.

Libels of information in the admiralty were filed by the United States, one seeking forfeiture of the British steamer "Sebastopol" for violation of the customs laws, the other seeking forfeiture of the American schooner "Ruth Mildred" for violation of the navigation laws. In each suit a decree was entered dismissing the libel, and the libellant has appealed. Decree as to the "Sebastopol" reversed; decree as to the "Ruth Mildred" affirmed.

For opinion below see 47 F. (2d) 336.

GEORGE Z. MEDALIE, *United States Attorney for Appellant*,
ARTHUR H. SCHWARTZ, *Assistant U. S. Attorney, Advocate*,

91 ARTHUR W. HENDERSON,
Special Assistant Attorney General,
Of Counsel.

LOUIS HALLE,
MILTON R. KROOPF,
Proctors for Appellee.

Opinion

SWAN, Circuit Judge:

These appeals have been argued together and may be disposed of in a single opinion, although, as will appear, somewhat different considerations are involved and have lead us to different results in the two suits. The general problem presented is whether a vessel which is discovered in the illegal transportation of liquor within territorial waters must be proceeded against under sec. 26 of Title II of the national prohibition act (27 USCA sec. 40) rather than for a violation of the customs or navigation laws.

The libel against the "Sebastopol" sought to enforce against her, pursuant to section 594 of the tariff act of 1922 (19 USCA sec. 498), penalties incurred by her master under section 584 of said act (19 USCA sec. 486) by reason of false manifesting of the cargo. Within territorial waters she was stopped and boarded by a Coast Guard officer who upon discovery that her cargo was falsely manifested arrested the master and seized the vessel. The unmanifested cargo consisted of 4,841 cases of Scotch whiskey. Following seizure of the vessel, the Coast Guard officer signed a complaint charging the master and crew with conspiracy to violate the national prohibition act as well as the tariff act of 1922. Nothing appears as to the ultimate disposition of this complaint. These facts, the claimant contended, disclosed that the vessel was engaged in the illegal transportation of liquor and required the Government to proceed against her in accordance with section 26 of Title II of the National
92 prohibition act (27 USCA sec. 40) instead of under the tariff act. The district court so held, dismissing the complaint.

That the seizure was not made by a prohibition officer would not preclude the Government from proceeding under section 26. Dodge v. United States, 272 U. S. 530; Commercial Credit Co. v. United States, 276 U. S. 226. That section preserves the rights of innocent owners or lienors; while forfeiture under the tariff act proceeds without regard to innocent interests. It is true that executive clemency may remit the forfeiture in favor of innocent persons (19 USCA secs. 520, 532), but mitigation by grace is not the equivalent of statutory immunity from forfeiture. The two procedures are, therefore, in direct conflict when applied to the forfeiture of a vessel seized within territorial waters while transporting unmanifested liquor; and the prohibition act, were it the later enactment, would prevail, as the Supreme Court held it did with respect to Revised Statutes, sec. 3450. Richbourg Motor Co. v. United States, 281 U. S. 528. But it is to be observed that the particular sections of the tariff act under which the libel against the "Sebastopol" was framed do not declare a forfeiture of the vessel; they merely impose a lien upon her for the payment of penalties incurred by the master. It may well be argued that a proceeding to enforce a lien under the tariff act is not in direct conflict with the proceeding to forfeit the vessel contemplated by section 26? Only by accident is it true in the case at bar that the penalty incurred is so great as to exhaust the entire value of the vessel and result in her for-
93 feiture. The two statutes are to be read so that both may stand, if possible, and we are disposed to say that no direct conflict appears when only the lien of a penalty is being enforced.

But if there be a direct conflict, the tariff act must prevail over sec. 26. It is the later enactment and contains in sec. 644 an express repeal of "all laws and parts of laws inconsistent with the provisions of this act." In reaching this conclusion we are not unmindful of the canon of construction that an earlier specific statute may be con-

sidered an exception to a later general statute broad enough in terms to include the subject matter of the former; but we do not think it applicable here, because the tariff act itself deals specifically with the importation of liquors in violation of the customs. Paragraph 813 of schedule 8 reads as follows:

"No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws."

The forfeiture thus directed is provided for in section 584, which declares, among other things, that unmanifested merchandise (which by section 401 "includes merchandise the importation of which is forbidden") consigned to the master shall be subject to forfeiture. Under the doctrine of "The Mistinguette," 27 F. (2d) 738 (C. C. A. 2) the liquor on the "Sebastopol" was consigned to her master. It was therefore forfeitable under section 584, and it seems clear that the other provisions of this section which impose a penalty upon the master equal to the value of the unmanifested
94 cargo are likewise applicable although the cargo be liquor. Similarly, as to the ancillary section 594 which subjects the vessel to a lien for the penalties incurred by the master. Therefore, notwithstanding the above-mentioned canon of interpretation and despite the statement in paragraph 801 of the schedule that nothing in this schedule shall be construed as limiting or restricting the provisions of the national prohibition act, we can not interpret sections 584 and 594 otherwise than as applying specifically to an unmanifested cargo of intoxicating liquor and as superseding pro tanto the earlier enacted section 26, if a conflict exists. Consequently the libel brought against the "Sebastopol" was erroneously dismissed.

Different considerations are applicable to the schooner "Ruth Mildred." She was licensed to engage in the fisheries and was charged with violating her license by engaging in the illicit liquor trade. Forfeiture was sought under Revised Statutes, sec. 4377. Violation of her license results under this statute in forfeiture of the vessel without regard to the innocence of her owner. This section antedates the national prohibition act and is therefore superseded by section 26 so far as the two statutes are in direct conflict. As already noted with respect to the tariff act, the possibility of executive clemency under the provisions of Revised Statutes, section 5294, will not avoid the conflict. Dismissal of the libel against the "Ruth Mildred" was therefore right provided she was seized under circumstances which rendered section 26 applicable.

The schooner was trailed by a Coast Guard vessel from a point in Long Island Sound until she tied up at a dock in New

95 York Harbor. The crew and master then left her, but a few minutes later the master returned and, on being informed that the coast Guard vessel was going to stand by until the schooner's cargo was unloaded, he confessed that most of his cargo was liquor. Thereupon he was placed under arrest, the boat was seized, and a complaint filed, charging the master with conspiracy to violate the national prohibition act and the tariff act of 1922. Nothing further is disclosed regarding this proceeding.

Section 26 directs that when a person is discovered in the act of illegally transporting liquors in any water craft, the officer of the law shall seize the liquors "therein being transported contrary to law" and shall take possession of the boat. When the schooner and her cargo were seized she had come to rest at the wharf, and it may be argued with some plausibility that the transportation was over, so that section 26 no longer applied. United States v. One Buick Automobile, 33 F. (2d) 353 (S. D. Ga.); cf. (before transportation began) United States v. One Ford Coupe Automobile, 272 U. S. 321; United States v. One Studebaker Coach Automobile, 32 F. (2d) 866 (C. C. A. 9). But we do not think the section should receive so technical a construction. Here the master was discovered in the act of transportation, although knowledge of the nature of his cargo was not obtained until his subsequent confession. In our opinion his possession of the liquor continued to be a possession incident to transportation, and the facts were sufficient to satisfy the condition precedent to making a seizure under section 26. See Commercial Credit Co. v. United States, 33 F. (2d) 228 (C. C. A. 9); United States v. One Chevrolet Automobile, 21 F. (2d) 277 (D. Ala.),
96 aff'd as United States v. General Motors Acceptance Corp., 25 F. (2d) 238 (C. C. A. 5); United States v. One Buick Coach Automobile, 34 F. (2d) 318 (N. D. Ind.). Accordingly, we affirm the decree dismissing the libel as to the "Ruth Mildred."

The problem presented by these appeals has been the subject of considerable diversity of opinion in the various circuits. An authoritative decision may soon be expected as the Ninth Circuit has certified a similar question to the Supreme Court. Gen. Motors Acceptance Corp. v. United States, Nov. 23, 1931. Pending this decision any elaborate consideration of the authorities seems unnecessary. It will suffice merely to cite a few of them. As tending to favor the contentions of the appellant, see "The Pilot," 43 F. (2d) 291 (C. C. A. 4); United States v. One Reo Coupe Automobile, 46 F. (2d) 815 (D. Mass.); "The Daisy T," 48 F. (2d) 370 (D. Del.); contra, Colon v. Hanlon, 50 F. (2d) 353 (C. C. A. 1); Commercial Credit Co. v. United States, 53 F. (2d) 977 (C. C. A. 5); United States v. One Studebaker Automobile, 45 F. (2d) 430 (D. Ariz.).

Decree in No. 279 reversed, and decree in No. 280 affirmed.

97 In United States Circuit Court of Appeals, Second Circuit

Present: Hon. LEARNED HAND,
Hon. THOMAS W. SWAN,
Hon. AUGUSTUS N. HAND, *Circuit Judges.*

UNITED STATES, libellant-appellant

vs.

TWO-MASTED SCHOONER "RUTH MILDRED" NILS SODERBERG, claimant-appellee

Decree

Filed March 9, 1932.

Appeal from the District court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

(Title indorsement omitted.)

99 (Clerk's certificate to foregoing transcript omitted in printing.)

100 Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 734, United States of America vs. Commercial Credit Company, Inc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) Enter Attorney General. File No. 36,609. U. S. Circuit Court of Appeals, Second Circuit. Term No. 795. The United States of America, petitioner, vs. Two-Masted Auxiliary Schooner "Ruth Mildred," etc. Petition for a writ of certiorari and exhibit thereto. Filed March 14, 1932. File No. 36,609.

FILE COPY

No. 795

In the Supreme Court of the United States

October Term, 1937

UNITED STATES OF AMERICA, PETITIONER,

v.

TWO MARITIME-SCHOONER "KOTA MIN-DORO," LENGTH 52 FEET, BEAM 21.5 FEET, DRAFT 8.3 FEET, OFFICIAL NO. [illegible],

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CITATIONS

Cases:

General Motors Acceptance Corporation v. *United States*, No. 574, October Term, 1931 — 5

Pilot, The, 43 F. (2d) 491 — 6

Richbourg Motor Co. v. *United States*, 281 U. S. 528 — 4

United States v. *Commercial Credit Co.*, No. 734, October Term, 1931 — 5

Statutes:

National Prohibition Act, Title II, c. 85, 41 Stat. 305, 315—
Sec. 26 (U. S. C., Title 27, Sec. 40) — 7

Revised Statutes—
Sec. 4377 (U. S. C., Title 46, Sec. 325) — 8

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21.5 feet, depth 8.1 feet, official No. 222218

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit entered on March 9, 1932, affirming the decree of the District Court for the Southern District of New York dismissing a libel of information filed against the schooner *Ruth Mildred,* wherein the forfeiture of the vessel was sought under Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325).

OPINIONS BELOW

The opinion of the District Court (R. 50) is reported in 47 F. (2d) 336. That of the Circuit Court of Appeals has not yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether a licensed vessel of the United States seized by customs officers while illegally transporting a cargo of intoxicating liquor within United States territorial waters may be proceeded against by the Government only as provided in Section 26, Title II, of the National Prohibition Act, or whether in lieu of so proceeding the United States may libel the vessel for forfeiture under Section 4377 of the Revised Statutes for engaging in an unlicensed trade.

STATUTES INVOLVED

Section 4377 of the Revised Statutes and Section 26, Title II, of the National Prohibition Act, are printed in the Appendix, *infra*, pp. 7–9.

STATEMENT

The *Ruth Mildred* is an American two-masted auxiliary schooner which was licensed for fishing. (R. 41, 42.) On March 1, 1928, she was ob-

served by the Coast Guard in Long Island Sound off New London, Connecticut, making headway in the direction of New York. (R. 11, 12, 43.) A Coast Guard patrol boat followed her all night and until about eleven o'clock the next morning, when she docked in the East River, New York. (R. 13, 43.) At that point all the crew, including the master, hurriedly disappeared. (R. 13.) Later, however, the master, who was also the vessel's owner, returned to the scene. (R. 13, 14, 43.)

The master admitted to the Customs officers who were present to search the vessel that his ship contained liquor, and it was later determined upon search that the *Ruth Mildred* was carrying 390 packages of such merchandise. (R. 21, 22, 44.) The vessel was seized (R. 44) and her master was arrested (R. 16). No information respecting the criminal prosecution is contained in the record except that the master was charged in a complaint with having conspired with others unknown to violate the National Prohibition Act and the Tariff Act. (R. 46.)

In due course a libel of information was filed against the *Ruth Mildred* in the Southern District of New York, claiming her forfeiture under R. S. 4377 for engaging in an unlicensed trade. (R. 3.) Nils Soderberg, the arrested master, intervened in the suit as owner-claimant. (R. 6.) In his answer (R. 8) he denied generally the offense which was charged and contended in addition that the Govern-

ment had mistaken its remedy. It was his contention that that Government's exclusive right of action lay in Section 26, Title II, of the National Prohibition Act.

After trial the District Court entered a decree dismissing the libel. (R. 49.) This disposition of the case was affirmed by the Circuit Court of Appeals. Both courts held that the facts established a violation of the transportation features of the National Prohibition Act. They concluded, therefore, that the Government's exclusive right of action against the vessel was found in that Act.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in decreeing that the libel be dismissed and in holding that a licensed vessel of the United States seized while engaged in the unlawful trade of transporting intoxicating liquor in violation of her license could be forfeited only as provided in Section 26, Title II, of the National Prohibition Act. (R. 71, 72.)

REASONS FOR GRANTING THE WRIT

This case presents one important phase of the problem which has confronted the Government since this Court, in *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, discussed the question of conflict between Section 26, Title II, of the National Prohibition Act, and Section 3450 of the Revised Statutes. The general question is whether vessels

or vehicles which are apprehended in the illegal transportation of liquor within the United States must be proceeded against for forfeiture under the National Prohibition Act to the exclusion of applicable Customs and Navigation laws.

The diversity of views expressed upon this subject by the lower courts since the Richbourg decision is pointed out in detail in the appendix to a petition for writ of certiorari which is now before this Court in *United States of America, Petitioner,* v. *Commercial Credit Co.,* No. 734, October Term, 1931. Subsequent to the filing of that petition the Circuit Court of Appeals for the Second Circuit decided the instant case and a companion case, the *Sebastopol.* In the one the Government's libel was not sustained, while in the other it was. The *Sebastopol* was libeled for the collection of a penalty imposed under the Tariff Act of 1922.

It is understood that the claimant in the *Sebastopol* case intends to petition this Court for a review of that decision. If such a petition be filed the Government proposes to offer no opposition. The *Sebastopol* case presents another phase of the same general question. It would seem desirable that its question of statutory conflict should also be considered and decided by this Court.

Still another phase of the general question is now before this Court in *General Motors Acceptance Corporation* v. *United States,* No. 574, October Term, 1931, where conflict between Section 26, Title

II, of the National Prohibition Act, and Sections 3061–2 of the Revised Statutes is asserted. The relation of the instant case to case No. 574 is such that your petitioner suggests the desirability of having them considered together by this Court.

The decision of the Court of Appeals in the *Ruth Mildred* case is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Pilot*, 43 F. (2d) 491.

Wherefore, it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

MARCH, 1932.

APPENDIX

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally, shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction

of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen

of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 795

THE UNITED STATES OF AMERICA

v.

TWO-MASTED AUXILIARY SCHOONER RUTH MILDRED, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 25–36) is reported in 47 F. (2d) 336. That of the Circuit Court of Appeals (R. 44–47) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 9, 1932. (R. 48.) Petition for certiorari was filed March 14, 1932, and certiorari was granted March 28, 1932. (R. 48.)

Jurisdiction to issue the writ rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a vessel, licensed by the United States to engage only in the fishing trade, which is seized by customs officers while illegally transporting a cargo of intoxicating liquor within United States territorial waters must be proceeded against by the Government under Section 26, Title II, of the National Prohibition Act, or by libel for forfeiture under Section 4377 of the Revised Statutes for engaging in an unlicensed trade.

STATUTES INVOLVED

These are printed in the Appendix, *infra*, pp. 18–20.

STATEMENT

The *Ruth Mildred* is an American two-masted auxiliary schooner which was licensed for fishing. (R. 21, 22.) On March 1, 1928, she was observed by the Coast Guard in Long Island Sound, making headway in the direction of New York. (R. 4, 5, 22.) A Coast Guard patrol boat followed her all night and until about eleven o'clock the next morning, when she docked in the East River, New York. (R. 5, 22.) At that point all the crew, including the master, hurriedly disappeared. (R. 5–6.) Later the master, who was also the vessel's owner, returned to the scene. (R. 5, 6, 22.)

The master admitted to the customs officers who were present to search the vessel that his ship contained liquor (R. 6, 22–23), and it was later determined upon search that the *Ruth Mildred* was carrying 390 bags containing alcohol, liquor, and rye whiskey (R. 10, 23). The vessel was seized (R. 23) and her master was arrested (R. 7).

The record discloses no criminal proceedings except that the master, Nils Soderberg, was charged in a complaint with having conspired with others unknown to violate the National Prohibition Act and the Tariff Act of 1922. (R. 23–25.)

In due course a libel of information was filed against the *Ruth Mildred* in the United States District Court for the Southern District of New York, wherein her forfeiture was claimed under Section 4377 of the Revised Statutes for violation of the provisions of her license. (R. 1–2.) Soderberg, the arrested master, intervened in the suit as owner-claimant. (R. 3.) In his answer (R. 3) he denied generally the offense which was charged and then pleaded that the Government's exclusive right of action lay in Section 26, Title II, of the National Prohibition Act.

After trial the District Court entered a decree dismissing the libel. (R. 25.) On appeal the judgment was affirmed, the Circuit Court of Appeals holding that the evidence established transportation under Section 26, Title II, of the National Pro-

hibition Act, and that the Government's exclusive right of forfeiture was under that Section. (R. 44–48.)

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in decreeing that the libel be dismissed and in holding that a licensed vessel of the United States seized in the unlawful trade of transporting intoxicating liquor in violation of her license could be forfeited only as provided in Section 26, Title II, of the National Prohibition Act. (R. 36–37.)

SUMMARY OF ARGUMENT

Where a vessel licensed to engage in the fishing trade is seized while engaging in a trade other than that for which she is licensed, she is subject to forfeiture under Section 4377 of the Revised Statutes, notwithstanding that at the time of the seizure she was engaged in the unlawful transportation of intoxicating liquor, and hence was subject to forfeiture under Section 26, Title II, of the National Prohibition Act.

The two statutes are not inconsistent, or in direct conflict, and the former is neither repealed nor superseded by the latter. Each defines a different offense, and each covers a different field.

Richbourg Motor Co. v. *United States*, 281 U. S. 528, does not cover the instant case. There the gist

of the offense was the unlawful transportation of intoxicating liquor, and the Government sought to invoke an old internal revenue statute, more rigorous than Section 26, to meet a situation it was not intended to meet. In the instant case, the Government relies upon a statute which was created for the express purpose for which it is here sought to be used. The fact that the seized vessel was engaged in the unlawful transportation of liquor at the time of the seizure was purely incidental. The nature of the cargo was quite immaterial.

While it is true that Section 4377, unlike Section 26, does not preserve the rights of innocent owners and lienors, such rights are preserved by administrative determination under other provisions of the navigation laws.

Moreover, assuming that Section 4377 and Section 26 are conflicting, Congress has manifested an intention that the navigation laws shall apply to vessels violating such laws, notwithstanding that such vessels are at the time engaged in illegally transporting intoxicating liquor.

Much of the argument of the Government in its brief in *General Motors Acceptance Corporation* v. *United States,* No. 574, present term, is applicable to this case, and we respectfully refer the Court to that argument.

ARGUMENT

I

THE FORFEITURE PROVISIONS OF SECTION 4377 OF THE REVISED STATUTES ARE NOT INCONSISTENT OR IN CONFLICT WITH AND WERE NOT IMPLIEDLY REPEALED BY SECTION 26, TITLE II, OF THE NATIONAL PROHIBITION ACT

It is not disputed that at the time of her seizure the seized vessel here involved was employed in another trade than that for which she was licensed. (R. 21, 22, 23.) Accordingly, the facts of this case bring it squarely within Section 4377 of the Revised Statutes (p. 18, *infra*) which declares that any such vessel shall be forfeited. But it is contended, and both courts below held, that since at the time of the seizure the vessel was engaged in the illegal transportation of intoxicating liquor, forfeiture of the vessel may be had only under Section 26, Title II, of the National Prohibition Act (pp. 18–20, *infra*), the effect of the latter statute being to supersede *pro tanto* Section 4377 of the Revised Statutes.

For their conclusions both courts below relied upon *Richbourg Motor Co.* v. *United States*, 281 U. S. 528. In that case this Court held that where a person discovered in the act of transporting liquor unlawfully has been arrested and the transporting vehicle seized under Section 26, proceedings to forfeit the vehicle must be taken under that Section, and may not be taken under Section 3450 of the Revised Statutes which provides for the forfeiture of vehicles used in the removal or concealment of

any commodity with intent to deprive the United States of a tax upon it.

Although since the National Prohibition Act became effective the forfeiture provisions of the navigation laws have been used extensively, where applicable, against vessels seized while unlawfully transporting or concealing intoxicating liquor, it is significant that their use in this manner was not generally challenged until the decision in the *Richbourg case*. In a number of cases decided prior to the *Richbourg* decision the issue of conflict between the forfeiture provisions of the navigation laws and Section 26 of the National Prohibition Act might have been, and in some cases was, raised.[1] *The Cherokee*, 292 Fed. 212 (S. D. Tex.); *The Amriald*, 6 F. (2d) 413 (D. R. I.); *The Mineola*, 16

[1] In some cases the seizures were effected outside the territorial limits of the United States. *The Rosalie M.*, 4 F. (2d) 815 (S. D. Texas), affirmed 12 F. (2d) 970 (C. C. A. 5th); *The Lorraine Rita*, 6 F. (2d) 175 (E. D. Penn.), 16 F. (2d) 607 (E. D. Penn.); *The Underwriter*, 6 F. (2d) 937 (D. Conn.), 18 F. (2d) 483 (C. C. A. 2d), affirmed *sub nom. Maul* v. *United States*, 274 U. S. 501; *Stephens et al.* v. *United States*, 30 F. (2d) 286 (C. C. A. 5th); *Le Bouef et al.* v. *United States*, 30 F. (2d) 394 (C. C. A. 5th); *Ford* v. *Kline*, 42 F. (2d) 558 (S. D. Fla.); *The K-5631*, 50 F. (2d) 180 (E. D. N. Y.).

In other cases the transportation had been completed prior to the seizure. *Bush* v. *The Conejo*, 10 F. (2d) 256 (D. Mass.), 16 F. (2d) 204 (C. C. A. 1st); *The Evelyn Ruth*, 42 F. (2d) 458 (D. Mass.), 47 F. (2d) 849 (C. C. A. 1st); *The Marge*, 48 F. (2d) 649 (D. Mass.), affirmed in *Jackman* v. *United States* (C. C. A. 1st), February 25, 1932.

F. (2d) 844 (C. C. A. 1st); *The Ruth*, 20 F. (2d) 314 (C. C. A. 3d); *The Rosemary*, 23 F. (2d) 103 (D. N. J.), reversed on point of jurisdiction, 26 F. (2d) 354 (C. C. A. 3d); *The K–3696*, 36 F. (2d) 430 (E. D. N. Y.); *Alksne* v. *United States*, 39 F. (2d) 62 (C. C. A. 1st), certiorari denied, 281 M. S. 768.

In the *Mineola* and *Alksne cases* the claimants actually raised the contention that the forfeiture provisions of the navigation laws had been superseded by Section 26, but this issue was decided against the claimants. In *The Spray*, 6 F. (2d) 414 (D. R. I.) it was held that a criminal prosecution under the National Prohibition Act made necessary the forfeiture of the vessel under that Act.

The foregoing cases indicate clearly that neither the courts nor the claimants of vessels considered that there was any substantial merit in the contention that there was a direct conflict between the forfeiture provisions of the navigation laws and Section 26 of the National Prohibition Act, except, perhaps, where a criminal prosecution had been instituted under the latter Act.

After the decision in the *Richbourg case* claimants of vessels libeled for forfeiture under the navigation law in liquor cases began to contend that that decision demonstrated that there was a conflict between the forfeiture provisions of the navigation laws and Section 26 of the National Prohibition

Act. In determining this issue the lower courts have differed widely in their conclusions, and their decisions can not be reconciled.

In *The Pilot,* 43 F. (2d) 491 (C. C. A. 4th), it was held that no conflict or inconsistency existed. That court said (p. 493):

> There is nothing in common between the National Prohibition Act and the navigation laws, and a vessel that engages in an unlawful trade contrary to the terms of her license need not necessarily be proceeded against under the National Prohibition Act because of the fact that the contraband cargo she carries is liquor.

In *The Daisy T,* 48 F. (2d) 370 (D. Del.), the court likewise held that the forfeiture provisions of the Prohibition Act and the navigation laws did not conflict, although its declaration appears to be dictum.

In *Corriveau* v. *United States,* 53 F. (2d) 735 (C. C. A. 1st), and *Maniscalco* v. *United States,* 53 F. (2d) 737 (C. C. A. 1st), the court held that the forfeiture provisions of the navigation laws could be applied even though the offending vessel was engaged in illegally transporting intoxicating liquor where no person was discovered and arrested in the act of transporting liquor, and in *United States* v. *American Motor Boat K–1231,* 54 F. (2d) 502 (C. C. A. 2d), the court reached the same conclusion. In the case last mentioned the court said (p. 505):

> Moreover, section 4377 of the Revised Statutes, which imposes a forfeiture where a vessel engages in a trade for which she is not licensed, and sections 593 (a) and (b) and 594 of the Tariff Act, which provide forfeiture for smuggling, cover a different field from that of the illegal transportation of liquor. They are a settled and vital part of our general navigation and customs laws, and do not conflict with section 26 of title II of the Prohibition Act aimed merely at forfeiture for illegal transportation of liquor. They are much farther from it than section 3450 of the Revised Statutes, which was involved in the Richbourg decision, where the use of the vessel [vehicle] was in the removal of taxable goods. Such removal was equivalent to transportation for which forfeiture is provided by section 26.

In addition to the case at bar, where the court below appears to have departed from the doctrine which it announced in the *American Motor Boat case,* there are other cases holding that a conflict does exist where both Section 26 of the National Prohibition Act and the forfeiture provisions of the navigation laws are applicable under the facts. *Colon* v. *Hanlon,* 50 F. (2d) 353 (C. C. A. 1st); *United States* v. *Wilfred Corriveau,* decided February 25, 1932 (C. C. A. 1st), now pending before this Court on petition for certiorari, No. 825, October Term, 1931.

The Government contends that the cases last above cited have misconstrued the *Richbourg* de-

cision in applying it to the navigation laws. The situation before this Court in the *Richbourg case* is not fairly comparable to the situation in the instant case. There a person operating an automobile belonging to another was arrested and arraigned before a United States Commissioner on a charge of illegal transportation of intoxicating liquor. The liquor and the car used for its transportation were seized by the officer making the arrest. The United States Attorney did not proceed with the prosecution of that charge, however, but procured an indictment under Section 3450 of the Revised Statutes for removing and concealing spirits with intent to defraud the Government of a tax. Thereafter proceedings to forfeit the seized vehicle were had under the same section of the internal revenue laws.

It seems clear that the substance of the offense involved in the *Richbourg case* was the unlawful transportation of intoxicating liquor. There was no evidence of removal or concealment of intoxicating liquor with intent to defraud the United States of tax thereon *except as such removal or concealment was necessarily involved in any unlawful transportation of intoxicating liquor*. The Government there invoked an old internal revenue statute, more rigorous than the one made applicable to liquor transportation cases by the National Prohibition Act, to meet a situation it was not originally intended to meet.

The instant case involves the seizure of a vessel by Coast Guard officers for engaging in a trade other than that for which the vessel was licensed. The duties of such officers were primarily to enforce the customs and navigation laws as opposed to the Prohibition Act. The seized vessel was licensed for the fishing trade. As such it could not lawfully transport any cargo except fish. The character of the cargo of the seized vessel was immaterial so long as it was anything else other than that which it was licensed to carry. It was wholly immaterial to the offense with which the vessel was charged that it carried intoxicating liquors. The vessel would have been equally subject to forfeiture if it had carried a cargo of silk or sugar.[1]

We submit that Section 4377 of the Revised Statutes should not be held in conflict with Section 26 of the National Prohibition Act because of the presence of a fact which is wholly irrelevant in the application of Section 4377. While the application of Section 26 of the National Prohibition Act to cases involving illegal transportation of liquor is, as pointed out in the *Richbourg case*, of wide extent, we believe that complete meaning can be given to that section without overturning equal-

[1] The same is true of pleasure yachts. The navigation laws make it unlawful for them to engage in the transportation of any sort of merchandise for pay. The character of the merchandise is wholly immaterial. *United States* v. *American Motor Boat K–1251*, 54 F. (2d) 502 (C. C. A. 2d), *supra*.

ly important statutes of long standing which occupy a distinct and separate field. There is nothing in the language or history of Section 26 to indicate that Congress intended to create a class of law violators who were to be affected by no other laws except the National Prohibition Act. Nor does there appear to be any reason for according to a vessel engaged in the transportation of liquor which has violated the customs and navigation laws any greater privileges than any other vessel violating the customs and navigation laws. Congress did not intend to grant immunity to all offenses under other Federal statutes in the course of the commission of which there is an unlawful transportation of liquor.

The Court of Appeals held that the two statutes here involved were in direct conflict. But, generally speaking, statutes can not be in direct conflict unless they are identical in the offenses they define. If they do not describe or define the same offense they are not necessarily in conflict because each may be applied to one transaction or to one set of circumstances. *United States* v. *One Ford Coupe*, 272 U. S. 321. The test of identity of offenses is whether the same evidence is necessary to establish each of them. *Carter* v. *McClaughry*, 183 U. S. 365; *Burton* v. *United States*, 202 U. S. 344; *Gavieres* v. *United States*, 220 U. S. 338; *Morgan* v. *Devine*, 237 U. S. 632.

Applying this test, it seems clear that Section 4377 of the Revised Statutes and Section 26, Title II, of the National Prohibition Act are entirely different. Forfeiture under Section 26 is one of the consequences of a successful criminal prosecution. It becomes effective at the time a person is convicted. Forfeiture under Section 4377 is strictly *in rem*. It is independent of any criminal prosecution and is effective as of the time of the commission of the offense. *United States* v. *Stowell*, 133 U. S. 1. Under Section 26 proof of liquor transportation is essential. Under Section 4377 the character of the merchandise carried is immaterial. Under Section 26 the documentation of the offending vessel is unnecessary. Under Section 4377 violation of license is essential. Thus the offenses charged under the two Acts are not the same in substance, nor are they established by the same evidence. It follows, we submit, that the statutes are not in direct conflict and accordingly that Section 4377 is not impliedly repealed by Section 26.

Both courts below were influenced by the asserted difference between the navigation laws and the National Prohibition Act in respect to the preservation and protection of the rights of innocent owners and lienors in vessels libeled for forfeiture. But the fact was that in the instant case no innocent claimant had appeared. The only person who intervened was the owner of the vessel who had been directly involved in the violation of its license.

Moreover, the rights of innocent owners and lienors are conserved under the navigation laws. For many years the Secretary of the Treasury had authority to protect such interests, where the navigation laws were involved, by Section 5294 of the Revised Statutes. (U. S. C., Title 18, Sec. 642.) When the Department of Commerce was created those duties and responsibilities were transferred to the head of that department. (Act of February 14, 1902, c. 552, 32 Stat. 825.) The law applying to the remission and mitigation of such statutory forfeitures for the benefit of innocent interests is in effect to-day.

While the administrative relief granted under the navigation laws may not be the exact equivalent of that which is provided by Section 26 of the National Prohibition Act, it would seem to be substantially the same since it must be assumed that the executive having full authority to provide relief will exercise his function in a proper manner.

Reference is made in the Government's brief in *General Motors Acceptance Corporation* v. *United States*, No. 574, to some of the practical difficulties which will arise if Section 26 of the National Prohibition Act is held to have superseded the forfeiture provisions of the customs and navigation laws in all liquor cases where the element of transportation is involved. Those comments apply with equal force here.

II

CONGRESS HAS MANIFESTED AN INTENTION THAT THE NAVIGATION LAWS SHALL APPLY TO VESSELS VIOLATING SUCH LAWS, NOTWITHSTANDING THAT SUCH VESSELS ARE AT THE TIME ENGAGED IN THE UNLAWFUL TRANSPORTATION OF INTOXICATING LIQUOR

The laws of the United States regulating ships and shipping had their origin during the early days of the nation. The particular statute under which the present libel was pleaded, Section 4377 of the Revised Statutes, originated as Section 32 of the Act of February 18, 1793, c. 8, 1 Stat. 305.

It seems clear that the navigation laws were intended primarily to aid in controlling the importation of merchandise into the United States. In *The Friendship,* Federal Cases, No. 5124, Mr. Justice Story, in speaking of the Act of 1793, said:

> * * * the great object of that act is to secure the revenue of the United States from frauds, and to prevent a foreign trade from being carried on under color of a coasting license.

More recently, in *Maul* v. *United States,* 274 U. S. 501, this Court pointed out that Sections 4377 and 4337 of the Revised Statutes were "directed to the protection of the revenue."

Congress recognized the close relationship between the navigation laws and the customs laws by providing in Section 35 of the Act of February 18, 1793, that the navigation laws should be enforced in the same manner as the customs laws. This pro-

vision, still in effect as Section 4380 of the Revised Statutes, reads:

> All penalties and forfeitures which shall be incurred by virtue of this Title may be sued for, prosecuted, and recovered as penalties and forfeitures incurred by virtue of the laws relating to the collection of duties, and shall be appropriated in like manner; except when otherwise expressly prescribed. (U. S. C., Title 46, Sec. 328.)

This being the relationship between the two groups of laws, we submit that the intent of Congress to preserve in effect the customs laws, undisturbed by liquor legislation, comprehends by necessary inference the navigation laws. For a discussion of that legislative intent we respectfully refer the Court to Point I of the Government's brief in *General Motors Acceptance Corporation* v. *United States,* No. 574, present term, where it is argued that Congress has manifested an intention that the forfeiture provisions of the customs laws should be applicable to vessels and vehicles seized by custom officers in the act of illegally *importing* intoxicating liquor into the United States, notwithstanding the fact that at the time of seizure such vehicles or vessels were engaged in the unlawful *transportation* of intoxicating liquor.

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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G. A. YOUNGQUIST,
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ARTHUR W. HENDERSON,
Special Assistant to the Attorney General.
PAUL D. MILLER,
Attorney.

APRIL, 1932.

APPENDIX

STATUTES INVOLVED

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

> Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel-fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an

officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with

a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be so newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

MAR 21

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 795

UNITED STATES OF AMERICA,

Petitioner,

against

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21.5 feet, depth 8.1 feet, official No. 222218.

BRIEF FOR THE RESPONDENT

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Supreme Court of the United States

OCTOBER TERM, 1931

No. 795

UNITED STATES OF AMERICA,
Petitioner,
against
TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21.5 feet, depth 8.1 feet, official No. 222218.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT

Opinions Below.

The opinion of the District Court is reported in 47 Fed. (2d) 336. That of the Circuit Court of Appeals has not yet been reported, and is therefore printed in the appendix.

Jurisdiction.

The jurisdiction of this Court in invoked by petitioner under section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

The question presented is whether a licensed vessel of the United States seized by customs officers while illegally transporting a cargo of intoxicating liquor within United States territorial waters may be proceeded against by the Government only as provided in Section 26, Title II, of the National Prohibition Act, or whether in lieu of so proceeding the United States may libel the vessel for forfeiture under Section 4377 of the Revised Statutes for engaging in an unlicensed trade.

Statutes Involved.

Section 4377 of the Revised Statutes and Section 26, Title II, of the National Prohibition Act, are printed in the Appendix.

Statement.

While it is urged by respondent that the Circuit Court of Appeals correctly decided this case, nevertheless by virtue of the conflict between this decision and that of the Circuit Court of Appeals for the Fourth Circuit in

The Pilot, 43 Fed. (2d) 491,

respondent does not oppose the petition.

Respectfully submitted,

LOUIS HALLE,
Attorney for Respondent.

March, 1932.

Appendix.

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona

fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered licensed, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

BRITISH S. S. "SEBASTOPOL," her engines, tackle, apparel, and furniture, etc.,
Claimant-Appellee.

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21,5 feet, depth 8.1 feet, Official No. 222218,
Claimant-Appellee.

Before: L. HAND, SWAN, and AUGUSTUS N. HAND,
Circuit Judges.

Appeals from the District Court of the United States for the Southern District of New York

Libels of information in the admiralty were filed by the United States, one seeking forfeiture of the British steamer *Sebastopol* for violation of the customs laws, the other seeking forfeiture of the American Schooner *Ruth Mildred* for violation of the navigation laws. In each suit a decree was entered dismissing the libel, and the libellant has ap-

pealed. Decree as to the *Sebastopol* reversed; decree as to the *Ruth Mildred* affirmed.

For opinion below see 47 F. (2d) 336.

SWAN, *Circuit Judge:*

These appeals have been argued together and may be disposed of in a single opinion, although, as will appear, somewhat different considerations are involved and have led us to different results in the two suits. The general problem presented is whether a vessel which is discovered in the illegal transportation of liquor within territorial waters must be proceeded against under sec. 26 of Title II of the National Prohibition Act (27 U. S. C. A., sec. 40) rather than for a violation of the customs or navigation laws.

The libel against the *Sebastopol* sought to enforce against her, pursuant to section 594 of the Tariff Act of 1922 (19 U. S. C. A., sec. 498), penalties incurred by her master under section 584 of said Act (19 U. S. C. A., sec. 486) by reason of false manifesting of the cargo. Within territorial waters she was stopped and boarded by a coast guard officer, who, upon discovery that her cargo was falsely manifested, arrested the master and seized the vessel. The unmanifested cargo consisted of 4,841 cases of Scotch whiskey. Following seizure of the vessel, the coast guard officer signed a complaint charging the master and crew with conspiracy to violate the National Prohibition Act as well as the Tariff Act of 1922. Nothing appears as to the ultimate disposition of this complaint. These facts, the claimant contended, disclosed that the vessel was engaged in the illegal transportation of liquor and required the government to proceed against her in accordance with section 26 of title II of the National Prohibition Act (27 U. S. C. A., sec. 40) instead of under the Tariff Act. The district court so held, dismissing the complaint.

That the seizure was not made by a prohibition officer would not preclude the government from proceeding under section 26. *Dodge* v. *United States*, 272 U. S. 530; *Commercial Credit Co.* v. *United States*, 276 U. S. 226. That section preserves the rights of innocent owners or lienors; while forfeiture under the Tariff Act proceeds without regard to innocent interests. It is true that executive clemency may remit the forfeiture in favor of innocent persons (19 U. S. C. A., secs. 520, 532), but mitigation by grace is not the equivalent of statutory immunity from forfeiture. The two procedures are, therefore, in direct conflict when applied to the forfeiture of a vessel seized within territorial waters while transporting unmanifested liquor; and the Prohibition Act, were it the later enactment, would prevail, as the Supreme Court held it did with respect to Revised Statutes, sec. 3450. *Richbourg Motor Co.* v. *United States*, 281 U. S. 528. But it is to be observed that the particular sections of the Tariff Act under which the libel against the *Sebastopol* was framed do not declare a forfeiture of the vessel; they merely impose a lien upon her for the payment of penalties incurred by the master. It may well be argued that a proceeding to enforce a lien under the Tariff Act is not in direct conflict with the proceeding to forfeit the vessel contemplated by section 26. Only by accident is it true in the case at bar that the penalty incurred is so great as to exhaust the entire value of the vessel and result in her forfeiture. The two statutes are to be read so that both may stand, if possible, and we are disposed to say that no direct conflict appears when only the lien of a penalty is being enforced.

But if there be a direct conflict, the Tariff Act must prevail over sec. 26. It is the later enactment and contains in sec. 644 an express repeal of "all laws and parts of laws inconsistent with the provisions of this Act." In

reaching this conclusion we are not unmindful of the canon of construction that an earlier specific statute may be considered an exception to a later general statute broad enough in terms to include the subject matter of the former; but we do not think it applicable here, because the Tariff Act itself deals specifically with the importation of liquors in violation of the customs. Paragraph 813 of schedule 8 reads as follows:

> No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.

The forfeiture thus directed is provided for in section 584, which declares, among other things, that unmanifested merchandise (which by section 401 "includes merchandise the importation of which is forbidden") consigned to the master shall be subject to forfeiture. Under the doctrine of *The Mistinguette*, 27 F. (2d) 738 (C. C. A. 2) the liquor on the *Sebastopol* was consigned to her master. It was therefore forfeitable under section 584, and it seems clear that the other provisions of this section which impose a penalty upon the master equal to the value of the unmanifested cargo are likewise applicable although the cargo be liquor. Similarly, as to the ancillary section 594 which subjects the vessel to a lien for the penalties incurred by the master. Therefore, notwithstanding the above-mentioned canon of interpretation and despite the statement

in paragraph 801 of the schedule that nothing in this schedule shall be construed as limiting or restricting the provisions of the National Prohibition Act, we can not interpret sections 584 and 594 otherwise than as applying specifically to an unmanifested cargo of intoxicating liquor and as superseding *pro tanto* the earlier enacted section 26, if a conflict exists. Consequently the libel brought against the *Sebastopol* was erroneously dismissed.

Different considerations are applicable to the schooner *Ruth Mildred*. She was licensed to engage in the fisheries and was charged with violating her license by engaging in the illicit liquor trade. Forfeiture was sought under Revised Statutes, sec. 4377. Violation of her license results under this statute in forfeiture of the vessel without regard to the innocence of her owner. This section antedates the National Prohibition Act and is therefore superseded by section 26 so far as the two statutes are in direct conflict. As already noted with respect to the Tariff Act, the possibility of executive clemency under the provisions of Revised Statutes, section 5294, will not avoid the conflict. Dismissal of the libel against the *Ruth Mildred* was therefore right provided she was seized under circumstances which rendered section 26 applicable.

The schooner was trailed by a coast guard vessel from a point in Long Island Sound until she tied up at a dock in New York Harbor. The crew and master then left her, but a few minutes later the master returned and, on being informed that the coast guard vessel was going to stand by until the schooner's cargo was unloaded, he confessed that most of his cargo was liquor. Thereupon he was placed under arrest, the boat was seized, and a complaint filed, charging the master with conspiracy to violate the National Prohibition Act and the Tariff Act of 1922. Nothing further is disclosed regarding this proceeding.

Section 26 directs that when a person is discovered in the act of illegally transporting liquors in any water craft, the officer of the law shall seize the liquors "therein being transported contrary to law" and shall take possession of the boat. When the schooner and her cargo were seized she had come to rest at the wharf, and it may be argued with some plausibilty that the transportation was over so that section 26 no longer applied. *United States* v. *One Buick Automobile,* 33 F. (2d) 352 (S. D. Ga.); cf (before transportation began); *United States* v. *One Ford Coupe Automobile,* 272 U. S. 321; *United States* v. *One Studebaker Coach Automobile,* 32 F. (2d) 886 (C. C. A. 9). But we do not think the section should receive so technical a construction. Here the master was discovered in the act of transportation, although knowledge of the nature of his cargo was not obtained until his subsequent confession. In our opinion his possession of the liquor continued to be a possession incident to transportation, and the facts were sufficient to satisfy the condition precedent to making a seizure under section 26. See *Commercial Credit Co.* v. *United States,* 33 F. (2d) 228 (C. C. A. 9); *United States* v. *One Chevrolet Automobile,* 21 F. (2d) 277 (D. Ala.), affd. as *United States* v. *General Motors Acceptance Corp.,* 25 F. (2d) 238 (C. C. A. 5); *United States* v. *One Buick Coach Automobile,* 34 F. (2d) 318 (N. D. Ind.). Accordingly, we affirm the decree dismissing the libel as to the *Ruth Mildred.*

The problem presented by these appeals has been the subject of considerable diversity of opinion in the various circuits. An authoritative decision may soon be expected, as the Ninth Circuit has certified a similar question to the Supreme Court, *Gen. Motors Acceptance Corp.* v. *United States,* Nov. 23, 1931. Pending this decision any elaborate consideration of the authorities seems unneces-

sary. It will suffice merely to cite a few of them. As tending to favor the contentions of the appellant, see *The Pilot*, 43 F. (2d) 491 (C. C. A. 4); *United States* v. *One Reo Coupe Automobile*, 46 F. (2d) 815 (D. Mass.); *The Daisy T*, 48 F. (2d) 370 (D. Del.); *contra*, *Colon* v. *Hanlon*, 50 F. (2d) 353 (C. C. A. 1); *Commercial Credit Co.* v. *United States*, 53 F. (2d) 977 (C. C. A. 5); *United States* v. *One Studebaker Automobile*, 45 F. (2d) 430 (D. Ariz.).

Decree in No. 279 reversed and decree in No. 280 affirmed.

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Argued by
MILTON R. KROOPF.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 795

THE UNITED STATES OF AMERICA,

vs.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," etc.

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 795

THE UNITED STATES OF AMERICA,

vs.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," etc.

BRIEF FOR THE RESPONDENT

Opinions Below.

The opinion of the District Court (R. 25-36) is reported in 47 Fed. (2d) 336. That of the Circuit Court of Appeals (R. 44-47) has not yet been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered March 9th, 1932 (R. 48). The petition of certiorari was granted March 28th, 1932 (R. 48). Jurisdiction to issue the writ is based on section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether a vessel discovered in the act of transporting intoxicating liquors must be proceeded against under section 26, Title II of the National Prohibition Act, as was held both by the District Court and by the Circuit Court

of Appeals, or whether in lieu thereof a libel for forfeiture under section 4377 of the United States Revised Statutes for engaging in an unlicensed trade may stand.

Statutes Involved.

These are printed in the Appendix.

Statement.

The brief for the United States contains a comprehensive statement and for that reason such is omitted here.

Summary of Argument.

1. It is consonant with the language of section 26 and the intent of Congress as therein expressed to construe that statute as follows:

(a) It enjoins every officer of the law, whether he be a customs officer, a coast guardsman, or a prohibition agent, to seize the transporting vehicle under its terms.

(b) "In violation of the law," and "contrary to law" as used in that section is the equivalent of "contrary to law" in Section 593(b) of the Tariff Act and includes the violation of any law, such as the internal revenue or the Tariff Act. C. f. John H. Callahan v. United States, decided April 11, 1932, No. 576.

(c) Transported "or possessed illegally" as used in section 26 equally refers to an illegal possession of liquor in violation of any law, and includes the customs and internal revenue laws.

(d) Section 26 deals specifically with the vehicle and its objective is not the prosecution of the offender. It

refers to every type of conveyance, water and air craft and therefore contemplated the bringing in of liquor from the exterior of the United States.

(e) Its objective is the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, to the limited extent specified in that section.

(f) Whenever transportation *is involved* it applies.

Richbourg Motor Co. v. *U. S.*, 74 L. Ed. 1016, 281 U. S. 528.

2. Eliminate section 26 from our laws, and there remains a comprehensive system of laws which would render forfeit vehicles apprehended in the transportation of intoxicating liquor, for such statutes as are now being invoked as opposed to section 26 would still be applicable. It is therefore evident that the sole purpose of the enactment was to preserve the rights of the innocent claimant and lienor, and therefore the intent of Congress was to preclude the use of these other statutes.

3. The question of conflict between the statutes does not arise, it being sufficient to preclude any statute under which the rights of an innocent claimant and lienor are lost.

POINT I.

Whenever intoxicating liquors are transported contrary to law in a vehicle, the disposition of the vehicle must be had under the terms of section 26, title II of the National Prohibition Act.

Section 26, Title II of the National Prohibition Act deals exclusively with the liquor and the vehicle. It does not create the offense against the person. Its language is mandatory and governs the disposition of the vehicle. *Irrespective of what other statute may have been violated, if the facts bring it within the terms of section 26, Title II of the National Prohibition Act, then it and, it alone, controls.* No other statute preserves the rights of innocent claimants and lienors. Congress for the first time has departed from the Mosaic doctrine of absolute forfeiture irrespective of innocent interests, discarding the fiction that the res is the offender and it is guilty.

> *Goldsmith Jr. Grant Co.* v. *United States,* 65 L. Ed. 376, 254 U. S. 305.

Section 26 was therefore carefully drawn with that object in view.

> *Richbourg Motor Co.* v. *United States, supra.*

The opinion of this Honorable Court in the *Richbourg* case recognizes the obvious fact that there are other applicable statutes which must be violated contemporaneously with the violation of section 26, Title II of the National Prohibition Act and holds that the National Prohibition Act is the governing statute. The pertinent language of the *Richbourg* case reads as follows:

> "But the prescription in detail, by section 26, **whenever transportation is involved, of** successive steps to be taken, which, if followed, lead unavoidably to forfeiture **under that section and no other,** with the important consequence of protecting the interests of innocent third persons, suggests a definite purpose to make the protection effective by bringing all forfeitures in such cases under its controlling provisions. If the purpose were the more general one of imposing on government officers the general duty to procure the forfeiture at their election, either under section 26 **or any other applicable statute,** most of the requirements of section 26 might have been omitted. The end sought could have been attained more easily by the simple enactment, in the language of section 3450, that the offending vehicle 'shall be forfeited,' saving the rights of innocent lienors if the proceeding were had under section 26."

Nor is there any gainsaying but that such was the obvious intent of Congress and necessarily, to accomplish such purpose the language of the statute had to be couched not in prescriptive nor directory verbiage, but as drawn, in mandatory language. It was apparent to Congress when it enacted section 26 that statutes existed which were more drastic in their consequences, and for that reason, except for the mandatory provisions of section 26, the purpose of the said section might have been rendered unavailing since other applicable statutes more drastic than section 26 would defeat the purpose.

Suppose Congress had not enacted section 26 at all. Plainly vehicles used for liquor transportation would be absolutely forfeitable under applicable statutes such as revised statute 3450 or sections 3061-2 and the various other applicable Tariff acts as well as the navigation laws. But it was enacted in the face of all these comprehensive statutes. It conflicts with any statute having application

which results in the loss of interest in the vehicle irrespective of the innocence of the claimant or lienor. Section 26 might just as well have been omitted if other statutes could inflict absolute forfeitures or impose liens against vehicles irrespective of the innocence of the claimant or lienor.

It is difficult to perceive a case where the facts bring it within the terms of section 26, and yet, not within the terms of some other statute with the drastic consequence of absolute forfeiture.

A construction of section 26 which would allow a forfeiture under any other statute where the facts bring it within its terms would be to render section 26 nugatory and the passage of that act an empty ceremony. Subtle distinctions and fine reasoning may serve to raise doubts, but the evident intent of Congress is too clear to admit of any dispute.

It is clear that when Congress in Section 26 included water or aircraft and listed every possible means of conveyance, it had in mind the bringing in of liquor into the country from outside of its borders. Section 26 is most comprehensive, exceedingly broad in its scope, clear and definite in its purpose and specific with respect to the consequences of the illegal use of a vehicle in the carriage of intoxicating liquors.

To accomplish the apparent purpose of superseding and supplanting all other applicable statutes, Congress employed the mandatory language used in the section without which its purpose could not have been accomplished. This unequivocal expression of Congress should not be upset by judicial interpretation if it is possible to give effect to such intent.

A detailed analysis of section 26 reveals not alone that its provisions are mandatory, but also exclusive with respect to the disposition of a vessel found transporting in-

toxicating liquors. Its disposition when discovered in use in transporting intoxicating liquors is commanded by the terms of that statute. The section opens with the following language:

> "When * * * any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon," etc.

The phrase "in violation of the law" is equivalent to "contrary to law" and is sufficiently broad to include any law, navigation or customs. Just as in the case of

> *John T. Callahan* v. *U. S.*, decided April 11, 1932, No. 576,

the phrase "contrary to law" included a violation of the National Prohibition Act, it may with equal reason be argued that the phrase "in violation of the law," and "contrary to law" in section 26 of the National Prohibition Act, includes customs or navigation violations. And too, with equal force it may be argued that section 26, Title II of the National Prohibition Act deals specifically with the vehicle and its disposition, whereas the Tariff Act sections invoked in the companion case,

> *General Import & Export Co., Ltd.* v. *United States*, No. 811

do not specifically deal with the vehicle.

As a further reason which seems quite convincing that section 26 was to supplant and supersede all other statutes which may be held applicable, we find that Congress in its language imposes the duty of invoking that section on every officer of the law, for it states:

> "When the commissioner, his assistants, inspectors, *or any officer of the law* shall discover * * *." (Italics ours.)

Thus, comprehended within its injunction, are customs guards and coast guardsmen as well as prohibition agents.

Note further the following language of section 26:

> "Whenever intoxicating liquors *transported or possessed illegally* shall be seized by an officer, he shall take possession of the vehicle * * *."

The use of the phrase "transported or possessed illegally" renders the statute even broader in its scope and evinces the intention of Congress to deal with the transporting vehicle under section 26 when the liquor is illegally possessed on such transporting vehicle. The illegal possession there referred to is broad enough to include an illegal possession by virtue of the infraction of any law, be it customs or internal revenue or navigation by a vessel having liquor aboard in violation of its license. This construction of section 26 accords with the construction given section 593(b) of the Tariff Act of 1922 in the *Callahan* case, *supra*. It may also be added in support of this construction of section 26 that not alone is its language mandatory but also it saves the rights of innocent owners and lienors and Courts should be astute to save such rights unless Congress has evinced another intention by language equally as clear.

The problem presented by the group of cases touching on section 26 is not as difficult of solution as may seemingly appear from the resourcefulness of the government in its endeavor to circumvent the holding of this Court in the *Richbourg* case. It may not be amiss to point out at this time that the *Richbourg* case was not the moti-

vating cause for the assertion of the application of section 26 in the case at bar. The history of the case at bar, as well as its companion case, No. 811, reveals that the contention was made that section 26 applied exclusively, prior to the decision in the *Richbourg* case, and even prior to the granting of the writ in said case. The confusion, if any, exists by reason of the government attempting to invoke the more severe and drastic penalty in the face of the definite purpose of Congress to protect the innocent claimant and the innocent lienor. What good reason in conscience can exist for the imposition of the more drastic penalty if its imposition is justified solely by reason of possible executive clemency. The plain fact is that Congress, aware of the fact that numerous seizures would be made of vessels and vehicles carrying intoxicating liquors, fearing the consequent ruination of our credit system and in order to obviate this undesired result, made it plain in section 26 that it would depart from the usual course and preserve the innocent claimant's rights as well as those of the innocent lienor. In carefully chosen language it made it unambiguous and unequivocal that wherever a seizure of a vehicle or vessel is made upon which intoxicating liquors is being transported, *the disposition of the vehicle shall be made in accordance with the terms of that section,* regardless of what department the seizing officer may represent.

Suffice it to say that innocent lienors and innocent claimants lose their rights by resort to another statute, and such other statute necessarily falls if there is a transportation by the use of such vehicle, of intoxicating liquors. To rule otherwise would be to render nugatory the provisions of section 26.

The argument is advanced at page 12 of the government's brief that

> "It was wholly immaterial to the offense with which the vessel was charged that it carried intoxicating liquor. The vessel would have been equally subject to forfeiture if it had carried a cargo of silk or sugar."

The same argument exists with relation to Revised Statutes section 3450. If instead of intoxicating liquor the cargo had been tobacco, upon which the tax had not been paid, the vessel would have been forfeited absolutely without regard to the rights of an innocent owner or lienor. The plain fact is that Congress legislated in a specific fashion as to a specific merchandise, to wit, intoxicating liquor. When the transportation involves a transportation of such merchandise, section 26 governs. It may be far-reaching in its result but it is new in our law, for as already pointed out, no statute heretofore passed has preserved such rights and the language of such statute had to be, as it was, made clear and unequivocal with such object in view. It remains with the Legislature to change it if it so desires, but apparently Congress was content with the *Richbourg* decision as it construed the terms of section 26.

The government states at page 11 of its brief:

> "It seems clear that the substance of the offense involved in the *Richbourg case* was the unlawful transportation of intoxicating liquor. There was no evidence of removal or concealment of intoxicating liquor with intent to defraud the United States of tax thereon *except as such removal or concealment was necessarily involved in any unlawful transportation of intoxicating liquor*. The Government there invoked an old internal revenue statute, more rigorous than the one made applicable to liquor transportation cases by the National Prohibition Act, to meet a situation it was not originally intended to meet."

To paraphrase, it seems equally clear that the substance of the offense involved in the instant case was the unlawful transportation of intoxicating liquor. There was no evidence of the illegal use of the vessel except as such illegal use thereof was necessarily involved in the unlawful transportation of intoxicating liquors. The government here invokes Revised Statutes section 4377, more rigorous than the one made applicable to Prohibition cases by the National Prohibition Act, and which was even an older statute than section 3450 of the Revised Statutes.

It is not the age of the statute, nor its context nor an analysis as to whether or not such statute conflicts directly with section 26 which governs the problem in the case at bar. The issue is to be determined by the intent of Congress as expressed in section 26. We have endeavored to point out the enormous scope of section 26 and the government takes the position that it does not apply to importation by a vehicle. The government's brief in No. 579 states:

> "On the other hand in the National Prohibition Act Congress did not provide completely or comprehensively for the control of unlawful importation of liquor. Thus, that act contains no specific provision for the forfeiture of vehicles used in the unlawful importation of intoxicating liquors."

This contention is unsound. Within the meaning of the National Prohibition Act an importation takes place when the vessel arrives within the three-mile limit.

Cunard Steamship Co. v. *Mellon*, 262 U. S. 100, 67 L. Ed. 894.

Such arrival within the three-mile limit necessarily constitutes a transportation within the United States, and

therefore, even though section 26 does not specifically refer to illegal importation of intoxicating liquors on board of a vessel, *still it is sufficiently broad to reach the vehicle* in such enterprise.

The Circuit Court of Appeals for the Second Circuit, in the case of

United States v. *One Packard Truck*, 55 Fed. (2d) 882

held section 26 applicable exclusively where a truck was apprehended not in motion but under circumstances which revealed that it was part of a transaction involving the transportation of intoxicating liquors.

While the record does not reveal that the claimant in the case at bar was guilty, even if such were the fact, resort to section 26 must be had despite it. See

United States v. *One Packard Truck, supra.*

> "In the Richbourg case the claimants asserted interests as innocent lienors, and the inconsistency between section 3450 and section 26 was found to exist in the fact that the latter section protects the rights of innocent persons while the former section does not. In the present case the claimant did not assert he was innocent nor did he offer any evidence. Conceivably the Richbourg decision might be limited to a situation where a claim of innocent interest was asserted; forfeiture being allowable under either law as against an owner who did not allege and prove his innocence. Such a view would be subject to the practical objection of leaving uncertain until the conclusion of the trial which law was applicable. Moreover, section 26 seems to make it the duty of the arresting officers to proceed as directed in that section regardless of whether innocent persons are

> interested in the seized vehicle. We read the Supreme Court's opinions as laying down the rule that the *arrest of a person discovered in the act of transportation* requires proceedings for forfeiture to be taken under section 26, even as against an owner who participated in the illegal transportation with full knowledge."

Furthermore, the guilty claimant of a vehicle is vitally affected by a failure to invoke section 26 if it properly should be invoked. There may be a lien by an innocent holder upon his vessel which may be collected out of the vessel, and such rights would be lost if resort were had to any statute other than section 26.

We subscribe to the government's contention in No. 574 where at page 7 of its brief, it states:

> "The same reasoning which would sustain a holding that the forfeiture provisions of section 3061-3062 of the Revised Statutes are impliedly repealed by section 26 would probably apply to cases where other forfeiture provisions of the customs laws are involved, and likewise to forfeiture provisions in the navigation laws."

This Court has not held section 26 applicable to the exclusion of Section 3450 for any reason other than the fact that by the latter statute innocent claimants and lienors lose their interests.

In

United States v. One Ford Coupe Automobile,
71 L. Ed. 279, 272 U. S. 321,

there was no reference made in the complaint "to removal or transportation of liquor." Mr. Justice BRANDEIS, delivering the opinion of the Court states:

"The case at bar does not present any conceivable question of cumulative remedies or of election. While the second sentence in section 26 uses the words 'transported or possessed,' the context makes it very plain that the possession intended is possession in transportation. Hence that section is applicable only if a person is discovered in the act of transporting intoxicating liquor in violation of law."

Mr. Justice STONE, concurring, stating regarding Revised States section 3450 and section 26:

"But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict, in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition law with intent to defraud the United States of the tax. In that case sec. 26, it seems to me, plainly directs that the seizure shall be made and proceedings for forfeiture of the seized vehicle had under that section. In that event sec. 26 saves the interest of the innocent owner or lienor from the forfeiture required by section 3450. It appears to me that the conflict in such a case is direct and that section 26 by its terms is controlling."

Mr. Justice BUTLER, dissenting, stated as follows:

"Section 3450 forfeits the vehicle of an innocent owner or lienor. Section 26 expressly protects his property. The conflict as to the disposition of the automobile is direct, and that is the matter in controversy."

Mr. Justice BRANDEIS in the case of

Port Gardner Investment Co. v. *United States*,
71 L. Ed. 412, 272 U. S. 564

delivering the opinion of the Court, stated as follows:

> "The disposition of the automobile prescribed in section 26 became mandatory after Neadeau's conviction; and being inconsistent with the disposition under section 3450 necessarily precluded resort to proceedings under the latter section."

In concluding, it may not be amiss to cite certain portions of the opinion of this Court in the case of

Richbourg Motor Co. v. *United States, supra.*

which serve to illustrate that the construction of section 26 contended for herein is borne out by this Court:

> "The objective of section 26 is not the prosecution of the offender, elsewhere provided for, but the confiscation of the seized liquor and the forfeiture of vehicles used in its transportation, **to the limited extent specified in the section.** Every act which it enjoins on public officials is directed to that end."

And again:

> "We think that Congress did not take the precaution to enact the carefully chosen language of section 26 merely to impose general duties on prosecuting officers already placed on them by other sections of that act, but that its purpose was to preclude *the nullification of the protection which section 26 had extended to innocent third persons.*" (Italics ours.)

Thus, even in the face of an arrest under another statute, where the vehicle was apprehended in the transportation of liquors, the effect of this Court's holding is that the law makes the election and the proceedings must be had under section 26. If the law makes the election,

then the question of direct conflict or inconsistency between statutes does not even arise, for the sole statute which deals with the vessel and its disposition is section 26, irrespective of any other statute which may by its terms have application.

Respectfully submitted,

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On the brief.

Appendix.

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> **Unlawful transportation of liquor; seizure and destruction of liquor and sale of vehicle.** When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding

brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

Penalty for violation of license. Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.

SUPREME COURT OF THE UNITED STATES.

No. 795.—October Term, 1931.

The United States of America, Petitioner, *vs.* Two-Masted Auxiliary Schooner "Ruth Mildred," Etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 2, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

The schooner "Ruth Mildred" was licensed to engage in the cod and mackerel fisheries. On March 1, 1928, she was observed by the Coast Guard in Long Island Sound headed for New York. She was trailed by a patrol boat till she docked in the East River. The master admitted to the customs officers that his vessel was carrying intoxicating liquors, and upon the search that followed a stock of liquors was discovered. A libel of information was thereafter filed against the vessel praying a decree of forfeiture for breach of the navigation laws (R. S. § 4377; U. S. Code, Title 46, sec. 325) in carrying on a business not permitted by the license. The master intervened in the suit, and pleaded that the remedy under section 26 of the National Prohibition Act was exclusive of any other. The District Court, upholding that defense, dismissed the libel (47 F. (2d) 336), and the Circuit Court of Appeals affirmed. The case is here on a writ of certiorari granted on the petition of the Government.

Our decision in No. 574, General Motors Acceptance Corporation and others against the United States of America, would require a reversal of this judgment if the vessel had been seized for unlawful importation in violation of the tariff act. Even more plainly that result must follow where the basis of the seizure is a breach of the navigation acts growing out of a departure by the vessel from the conditions of her license. (Contrast with the decision below the decision of the same court in *United States* v. *American Motor Boat*

K-1231, 54 F. (2d) 502.) By section 4377 of the Revised Statutes (U. S. Code, Title 46, sec. 325): "Whenever any licensed vessel . . . is employed in any other trade than that for which she is licensed, . . . such vessel with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited." The "Ruth Mildred" was licensed for the fishing trade and not for any other. She would have been subject to forfeiture if her cargo had been wheat or silk or sugar. In a suit under this statute, her guilt was not affected, was neither enlarged nor diminished, by the fact that the cargo happened to be one of intoxicating liquors. The Government made out a case of forfeiture when there was proof that the cargo was something other than fish. Forfeiture under section 26 of the National Prohibition Act is one of the consequences of a successful criminal prosecution of a personal offender, and is ancillary thereto. Forfeiture under the Revised Statutes, section 4377, for breach of the navigation laws, is strictly *in rem*, and is not dependent upon a preliminary adjudication of personal guilt. *United States* v. *Stowell*, 133 U. S. 1, 16, 17. In brief, the basis of the charge of guilt directed against this vessel is not a breach of the National Prohibition Act nor any movement of transportation, lawful or unlawful. It is the act of engaging in a business other than the fishing trade in contravention of a license.

The decree should be reversed and the cause remanded for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.